Supreme Court, U. S.
FILED
OCT 26 1978
MICHAEL RODAK, JR., CLERK

78-703

No. 78-

In The
Supreme Court of the United States

October Term, 1978

ACKERMAN-CHILLINGWORTH,
Division of MARSH & McLENNAN, INCORPORATED,
a Delaware corporation, *et al.*,

Petitioners,

v.

PACIFIC ELECTRICAL CONTRACTORS
ASSOCIATION, a Hawaii corporation, *et al.*,

Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM M. SWOPE
ROBERT A. ROWAN
1000 Bishop Street
Honolulu, Hawaii 96813
Counsel for Petitioners

Of Counsel:
CADES SCHUTTE FLEMING & WRIGHT
1000 Bishop Street
Honolulu, Hawaii 96813

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Argued June 9, 1977 Decided March 22, 1978.)

ACKERMAN-CHILLINGWORTH, Division of MARSH & McLENNAN, Incorporated, a Delaware corporation; ALEXANDER OF HAWAII, INC., dba MID-PACIFIC INSURANCE DIVISION, a Hawaii corporation; AMERICAN MUTUAL UNDERWRITERS, LTD., a Hawaii corporation; BAYLY, MARTIN & FAY OF HAWAII, INC., a Hawaii corporation; DAVIES INSURANCE AGENCIES, INC., a Hawaii corporation; STANLEY S. HASHIMOTO; OCCIDENTAL UNDERWRITERS OF HAWAII, LTD., a Hawaii corporation; JACK T. OSAKODA; and RAYMOND T. TANAKA, *Appellants,* v. PACIFIC ELECTRICAL CONTRACTORS ASSOCIATION, a Hawaii non-profit corporation; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 1186; PACIFIC EMPLOYERS INSURANCE COMPANY, a California corporation; THE INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; WALTER T. ODA and AKITO FUJIKAWA, *Appellees.*	) No. 76-1264)	OPINION

Appeal from the United States District Court for the District of Hawaii

Before: ELY, HUFSTEDLER, and WRIGHT, Circuit Judges.

ELY, Circuit Judge:

This is a private antitrust action challenging a workmen's compensation plan, which was implemented by an employers' association pursuant to a collective bargaining agreement. The appellants alleged that the plan was both illegal *per se* and unlawful as contrary to the rule of reason under section 1 of the Sherman Act, 15 U.S.C. § 1 (1970). The opposing parties moved for summary judgment, and the District Court granted the motion of the appellees, writing an excellent opinion, reported at 405 F. Supp. 99 (D. Hawaii 1975). Here, the appellants vigorously challenge the propriety of the order.[1]

FACTS[2]

Appellants, who are general insurance agents and insurance solicitors in Hawaii, filed a complaint against the Pacific Electrical Contractors Association (PECA), a trade association, its executive secretary, one Oda, the International Brotherhood of Electrical Workers, Local 1186 (IBEW), its business manager, named Fujikawa, the Insurance Company of North America (INA), and the latter's wholly-owned subsidiary, Pacific Employers Insurance Company (PEIC). Of the approximately 120 electrical contractors in Hawaii, 63 are dues-paying members of PECA. PECA negotiates with IBEW on behalf of all the contractors, who, accordingly, have signed a collective bargaining contract with IBEW.

Prior to 1974 the electrical contractors purchased their insurance individually from a number of carriers through different agents. Hawaii's law permits employers in an occupational field to form "safety groups" for the purpose of purchasing their insurance from a single carrier. Haw. Rev. Stat. § 431-693(3) (1968). Safety groups have been extensively utilized in other states but were uncommon in Hawaii until the concept was introduced by the appellees.

Several characteristics of safety groups make their use attractive. First, the insurance carrier encourages cooperative efforts among employers, workers, and insurers aimed at reducing occupational hazards and improving employee rehabilitation programs. The increased effectiveness of such safety and rehabilitation programs promotes diminution of the amounts of premiums. Second, insurance purchased by members of a safety group is one of the participating type; thus, dividends are payable at the end of the policy term. In the safety group context, insurance carriers are more likely to declare large dividends rather than risk losing business to a competitor. Third, and most significantly, all employers in a safety group are eligible to receive dividends, even though carriers generally do not pay dividends to small employers. This feature was particularly attractive to the electrical contracting industry, which consists largely of small employers.

In May, 1973, IBEW proposed to PECA that all Hawaii electrical contractors place their workmen's compensation insurance either with one carrier or through a Taft-Hartley trust fund. Union officials believed that either plan would benefit the employees by providing for better claims service through a centralized administration. In addition, a single insurer would likely have more incentive and a greater opportunity to upgrade safety and rehabilitation programs.

IBEW offered to PECA the option to manage such a workmen's compensation insurance plan at a meeting of PECA's Board of Directors held on May 23, 1973. Fujikawa, of IBEW, expressed concern about the financial condition of PECA. He suggested that electrical contractors would receive reduced rates under a group insurance plan and that PECA could supplement its income by charging electrical contractors a fee for administering such a plan. To secure the anticipated benefits for the union and PECA, Fujikawa and the PECA Board agreed that contractors who were not members of PECA

[1] In a second count, the appellants alleged that the collective bargaining agreement violated § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1970). The District Court rejected this claim, 405 F. Supp. at 114-18, and the appellants do not renew the contention on appeal.

[2] In summarizing the facts, we have borrowed extensively from the District Court's thorough exposition. *Id.* at 102-07.

should also be required to participate in the plan.

In September, 1973, Martin E. Segal Company (Segal), a consulting firm that had assisted PECA and IBEW in insurance matters, evaluated the IBEW proposal. In lieu of a Taft-Hartley trust fund, Segal recommended a dividend safety group plan called the "Association Dividend Group Plan." Under this plan the contractors would continue to pay premiums calculated according to the individual risks of their businesses, based upon considerations such as their type of work, volume of payroll, and safety record. Dividends would be computed, however, according to the record of the entire group of contractors. Segal estimated that total dividends under the proposed plan would exceed those that the contractors were currently earning.

Oda reported Segal's proposal to the PECA Board of Directors. He suggested earmarking a percentage of the dividends for an employee rehabilitation program. He also recommended that, in order to supplement the income of PECA, dividends be applied to PECA dues, "with the inference that non-members would be forfeiting their dividends."

PECA's Board of Directors and IBEW officials held a joint meeting on September 27, 1973, to discuss the Segal plan. The PECA directors agreed to recommend that its members adopt the "Association Dividend Group Plan," with the mandatory participation of all employers covered by the collective bargaining agreement.

On October 26, 1973, PECA convened a meeting of the general membership to discuss the proposed group plan and nonmember contractors were invited to attend the meeting. Berton Jacobson, representing Segal, explained the features of the proposed plan, including its mandatory character and the distribution of dividends. He projected an overall fifteen percent savings in premiums under the group plan. The membership approved an amendment to the collective bargaining contract that required participation of all signatory contractors, with the plan administered by PECA. The amendment read:

ARTICLE XIX-WORKMEN'S COMPENSATION

Section 1. The parties agree that present practices and procedures for compensation of employees for occupational illness and injuries are unsatisfactory, and require substantial improvement.

Section 2. The parties agree that all Employers will participate in an "Association Dividend Group Plan" providing for workmen's compensation insurance coverage for their employees, as recommended by the actuary designated by the parties. The Plan will be administered by PECA. The Union shall be consulted by PECA prior to making any important policy decisions which may affect the employees.

Section 3. The Plan shall be initiated February 1, 1974.

During the following weeks a number of insurance carriers and agents expressed to Oda their disapproval of the mandatory nature of the plan. In a letter to Jacobson, Oda wrote, "I'm still getting calls from sub-agents who feel we will be putting them out of the workmen's compensation business."

On November 19, 1973, Segal sent a specification letter to nine insurance carriers to solicit bids for the PECA plan. The letter requested written proposals concerning promptness of claims payments, safety and rehabilitation programs, and dividend payments. It did not specify a general agent or whether the plan would be "open" or "closed" in the sense that only one or a limited number of agents could represent the carrier. In a letter written on the same day, Jacobson warned Oda to furnish the specification letter only to direct representatives of carriers—not to agents or brokers, who might claim an entitlement to compensation for their services.

Only three insurance companies submitted bids: First Insurance Company of Hawaii, Argonaut Insurance Company, and INA. The First Insurance Company bid, which one White of Segal rejected, "require[d] the free choice of an insurance agent by the insured," and offered a dividend plan "applicable to individual risk, with the amount of the dividend being determined on the basis of that risk's premium size and experience." White testified that the bid was rejected because it did not contain a group dividend plan, as requested in the specifi-

cation letter.[3]

Segal recommended the INA plan, and the PECA Board of Directors accepted that plan on January 24, 1974.[4] INA proposed to write the policies through PEIC, its subsidiary. INA quoted a minimum retention rate of 31.9 percent, which was more favorable than the 40.8 percent retention quoted by Argonaut Insurance Company. INA stated in its proposal that it would acquiesce to the appointment of a broker to coordinate the plan if PECA so desired.

Oda had been licensed as an insurance solicitor since 1957 but was inactive for a number of years before the implementation of the group plan. In order to supplement PECA's income, PECA intended that Oda should serve as agent of record[5] for the group plan and contribute his net commissions to PECA to defray some of the costs of administering the plan. The Yamada Insurance Agency, Ltd., for whom Oda solicited, entered into a nonexclusive general agency agreement with INA. The agreement authorized Yamada to solicit, accept, and bind risks for INA and PEIC. Consequently, all policies sold by Oda under the group plan were written by Yamada.

Oda wrote to all the signatory contractors on January 31, 1974, reminding them that the amended collective bargaining agreement required participation in the group plan and soliciting their applications for INA policies. Oda asked that each contractor notify him as to the expiration date of its current workmen's compensation policy. The contractors were permitted to retain their current coverage until its expiration, at which time their procurement of an INA policy would be required.

[3]Oda testified that the requirement included by the First Insurance Company that contractors have a free choice of agents did not meet the bid specifications. Appellants argue that the First Insurance Company bid was rejected for this reason. The bid proposal did not, however, preclude free choice of agents. In addition, White, not Oda, was responsible for the rejection of bids, and Oda testified that he did not know why the bid was rejected.

[4]At this meeting Jacobson stated that he knew of no other instance in the United States in which a labor agreement required that employers participate in a particular group workmen's compensation program.

[5]An agent of record is a solicitor who sells a particular policy to a particular insured.

During the next eleven months, Oda sent numerous follow-up letters to the contractors who had not yet acquired a group plan policy. The appellants alleged that Oda, with his aggressive solicitation tactics, coerced contractors to purchase PEIC policies through him. The record does not support that claim. It is true that Oda firmly told contractors that they could not renew their coverage with their present carriers and that it was necessary that they purchase a PEIC group policy. This was his responsibility as business manager of PECA. While he encouraged the contractors to obtain their policies through him, it was evident that he never told any contractor that the contractor must deal through him rather than through another insurance solicitor.

From the inception of the group plan, INA insisted that the plan should remain "open," insofar as to permit any agent representing INA/PEIC to issue policies to signatory contractors. Yamada's president advised one of the appellants, Bayly, Martin and Fay (BMF), a general agent, that BMF could issue policies. PEIC appointed BMF a general agent in August, 1974, but by that time one of the firm's clients had already switched to the PECA plan through Oda.[6]

Oda objected to the stance of INA because he feared a loss in his net commissions, which PECA would receive for application to its expenses of administering the group plan. In written communications to the PECA Workmen's Compensation Committee, the PECA Board of Directors, and Jacobson, Oda characterized the use of other agents as discriminatory in nature. Oda's views, however, did not have any apparent influence upon the terms of the collective bargaining agreement, which did not require that Oda handle the policies, or upon the practices of Yamada, PEIC, or INA.

Shortly thereafter, Atlas Insurance Agency, Ltd., requested that it serve as agent of record under the group plan, with contractors having the right to a free choice of agents.

[6]One member of BMF stated in an affidavit that in June, 1974 a PECA representative told him that he "would not be allowed to sell or service workmen's compensation insurance business with any of the signatory electrical contractors . . . regardless of whether such insurance was placed with [PEIC]." Nevertheless, two months later BMF received an appointment from PEIC.

Oda and PECA summarily rejected the proposal because it would have eliminated PECA's supplemental income.

Two insurance agents other than Oda, one of them the parent company of an appellant, sold PEIC insurance to signatory contractors in 1974 and 1975. Between February 1, 1974, and June 20, 1975, 114 of the 128 signatory contractors bound by the collective bargaining contract placed their PEIC insurance policies through Oda and Yamada.

JURISDICTION

IBEW and Fujikawa contend that we lack jurisdiction under 28 U.S.C. § 1292(a)(1) (1970) because the District Court's order was not interlocutory. They urge that the order was final because it disposed of the entire claim of appellants and, moreover, that no jurisdiction attached under 28 U.S.C. § 1291 (1970) because appellants failed to secure the certificate of final judgment prescribed by Fed. R. Civ. P. 54(b).

Appellants support their argument with isolated language from *In re Merles, Inc.*, 481 F.2d 1016, 1018 (9th Cir. 1973):

> An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken to adjudicate the cause on the merits.

The *Merles* decision, however, is not germane to this case. In *Merles* we held that an order of the bankruptcy court, disapproving a compromise of a claim of the bankrupt's estate against a secured creditor, was not a final judgment for purposes of appellate review under 11 U.S.C. § 47(a) (1970).

We hold that we do have jurisdiction under section 1292(a)(1). Appellants requested injunctive relief in their complaint, which the District Court denied. Moreover, the District Court order is interlocutory for purposes of appellate review since Oda and PECA's counterclaim under the Sherman Act remains pending. Whenever a court fully adjudicates a claim for an injunction and does not execute a Rule 54(b) certificate, the adjudication is interlocutory if other claims remain pending. *Hartford Fire Insurance Co. v. Herrald*, 434 F.2d 638, 639 (9th Cir. 1970); *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 243 (3d Cir. 1969); *Ronel Corp. v. Anchor Look, Inc.*, 312 F.2d 207, 208 (9th Cir. 1963).

THE PER SE RULE—SHERMAN ACT § 1

The appellants alleged that the requirement of the collective bargaining contract that all signatory contractors provide workmen's compensation insurance through the "Association Dividend Group Plan" constitutes a group boycott that it [*sic*] illegal *per se*. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,, 359 U.S. 207 (1959). Thus, their position is that the arrangement violated section 1 of the Sherman Act regardless of the arrangement's economic effects or the motivations of the appellees.

The District Court rejected appellants' argument, reasoning that IBEW and PECA did not refuse to deal with insurance carriers, that insurance agents were not precluded from writing PEIC group policies, and that, even assuming *arguendo* that "an *implicit* agreement existed to use Oda exclusively, there would still not be a *per se* violation of § 1." 405 F. Supp. at 109 (emphasis in original).

In reviewing the propriety of the District Court's summary judgment in a complex antitrust case, we look at the record in the light most favorable to the appellants, here, the parties opposing the motion for summary judgment that was granted. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962). We nevertheless conclude that the record could not support a finding that appellees committed a *per se* violation of section 1.

First, appellants criticize the requirement that all contractors use one insurance carrier, but this feature cannot stigmatize the group plan as a boycott. Appellees solicited competitive bids from nine insurance companies, and it is not alleged that they refused to deal with other insurers. Furthermore, appellants, who are insurance agents and solicitors, have not demonstrated how the sole carrier requirement may have done harm to them.

The second theory presented by appellants is that Oda's underwriting of policies constituted a boycott of insurance

agents such as themselves. Appellants stress particularly the mandatory nature of the group plan and Oda's backing and success in soliciting policies, suggesting that appellants were thereby precluded from also soliciting the workmen's compensation policies.

It was the legitimate desire of PECA and IBEW that Oda should write as many of the INA/PEIC policies as possible. Oda had made a very attractive offer to PECA and the contractors, *i.e.*, he would use his net commission income to offset PECA's cost of administering the group plan. It was in the self-interest of the individual PECA-member contractors to purchase their insurance through Oda in order to reduce the expenses of PECA. Moreover, Oda aggressively solicited the business of all the signatory contractors, both members and nonmembers of PECA. He persistently reminded recalcitrant contractors that their labor agreement required that they purchase PEIC workmen's compensation insurance, sending them applications for insurance to be processed through him.

There is, however, no support whatsoever in the record for appellants' contention that the appellees coerced contractors to deal only with Oda.[7] The labor agreement did not specify

[7] Assuming *arguendo*, as did the District Court, 405 F. Supp. at 109, that the appellees implicitly agreed to utilize Oda exclusively, such an arrangement would still lack the distinguishing characteristics of boycotts that have been labeled illegal *per se*. Appellees are not a horizontal combination of competitors organized to exclude direct competition, which the Supreme Court condemned in *Eastern States Retail Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (lumber retailers blacklisted wholesalers who sold to retailers' customers). Nor are IBEW/PECA and INA/PEIC vertically aligned with the intent to exclude competitors from one of their markets, as in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (single retailer induced manufacturers to exclude competing retailer). Unlike Broadway-Hale Stores in *Klor's*, PECA, Oda, and the contractors agreed to deal with Oda alone, not to improve Oda's competitive position as an insurance solicitor but to aid PECA and to improve the quality of the contractors' insurance plan. Nor were the appellants able to show any concerted refusal to deal, designed so as to influence the trade practices of the appellants. *See Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons*, 340 U.S. 211 (1951) (liquor manufacturers collectively refused to sell to price-cutting wholesalers); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941) (original designers refused to sell to retailers who sold copies of the original designs). *See generally E.A. McQuade Tours, Inc. v. Consolidated Air Tours Manual Comm.*, 467 F.2d 178, 186-87 (9th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

Under the assumption that there was a boycott, the requirement that all the contractors participate in the group plan and purchase PEIC insurance does not affect our application of the *per se* doctrine. The contractors who may have preferred not to join the plan are not boycott victims, and the impact of the arrangement on insurance agents is no different qualitatively because of the mandatory nature of the plan. *See* 405 F. Supp. at 108 n.43.

Thus, in the absence of any of the competitive injuries wrought by the classic-type boycotts traditionally considered as unlawful *per se*, the District Court properly rejected application of the *per se* rule. *Joseph E. Seagrams & Sons v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), is instructive. Two distillers, who were dissatisfied with the performance of their joint distributor, agreed to transfer their business to a new distributor. Our court refused to apply the *per se* rule because of the lack of evidence that the distillers were motivated by a purpose other than the desire to improve the distribution of their products. *Id.* at 78, 80. Similarly, there is no indication here that the appellees established their group plan of insurance, with its alleged boycott of appellants, in order to protect Oda from competing insurance solicitors. Rather, their motive was clearly shown to be the improvement of the quality of their insurance coverage and the decrease of its cost. *See also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977), *aff'g* 537 F.2d 980 (9th Cir. 1976) (considerations militating against use of *per se* rule).

that only Oda could solicit the contractors' business, and the appellants presented no evidence that any contractor believed that he could not purchase a PEIC policy through the agent of his choice. At numerous times, INA made it clear that any INA agent could write policies for the contractors, and INA even appointed one of the appellants as an agent. It is true that Oda, for obvious good reasons, sold the vast majority of the contractors' policies, but it is also true that other agents did, in fact, sell some of the policies.

THE RULE OF REASON—SHERMAN ACT § 1

Appellants' next line of attack under the Sherman Act is that, under the "rule of reason," section 1 condemns the group insurance plan. The rule of reason prohibits every contract, combination, or conspiracy that significantly restrains competition. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911); *see United States v. Topco Assocs., Inc.*, 405 U.S. 596,

606-07 (1972). Whether a particular restraint unduly suppresses competition depends upon the facts peculiar to the business in which the restraint is applied, the nature and history of the restraint, its probable effect, and the reasons for which it was adopted. *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

The complaint of appellants is that Oda's role in the group plan, coupled with the mandatory requirement that all signatory contractors to the collective bargaining agreement participate in the group plan, prevented the appellants from competing with Oda for the contractors' insurance business. In particular, they stress Oda's return of commissions to PECA and his efforts to ensure the compliance of the contractors with the collective bargaining agreement as features of the arrangement leading to Oda's success at their alleged expense.[8]

The District Court ably explained the considerations that motivated IBEW and PECA to implement the group plan:

> The IBEW initiated its proposal for a change in the method of purchasing insurance in order to create opportunities for better claims service for its members, more effective safety plans, and better rehabilitation programs. The PECA eventually agreed to the group-plan approach because it saw several direct benefits for electrical contractors in addition to the direct benefits to its employees. Better safety and rehabilitation programs could reduce premiums. Group purchasing could lead to lower retentions by the carriers. Group evaluation of dividends could make all contractors eligible to receive dividends regardless of the size of their individual premiums, increasing total dividends. Commissions earned by Oda and credited to the PECA could cover expenses incurred in administration of the plan, as well as e ntually lead to reduced premiums through a negotiated lower commission.

[8] In this summary proceeding the District Court, despite the dearth of evidence, assumed that a majority of the PECA-member contractors and Oda agreed that henceforth the contractors would purchase insurance only through Oda, compelling all signatory contractors to the collective bargaining agreement to do likewise. 405 F. Supp. at 111. In light of the factors discussed below, this assumption would not lead to a different result in our application of the standard of reasonableness.

405 F. Supp. at 110. In essence, PECA sought to obtain a better product, insurance, at a lower cost, a goal that would appear to enhance, rather than diminish, competition among suppliers of that product. Oda's underwriting of the policies furthered a salutary objective.

Appellants attack the professed purpose of appellees as a purpose designed to disguise sinister, monopolistic intentions. They have, however, presented no evidence of any such anticompetitive motivation on the part of IBEW, PECA, Oda, PEIC, or INA. In this respect, this case resembles *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), wherein our Brother Duniway wrote:

> Nothing in the record suggests, much less would support an inference, that [defendant's] purpose was to eliminate or damage plaintiff, or to force it to comply with unlawful demands, rather than to get better distribution of Seagram and Barton products . . . Surely, this is the essence of competition. Surely, liability for treble damages should not be based on such second guessing of business judgment by a jury.

In applying the rule of reason, our analysis does not end with an examination of purpose. Even though the purpose of a trade practice is innocent or benign, it may be unreasonable if it is substantially harmful to competition. *E.g.*, *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1322 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *Rex Chainbelt Inc. v. Harco Prods., Inc.*, 512 F.2d 993, 1006 (9th Cir.), *cert. denied*, 423 U.S. 831 (1975). Here, the decision that Oda should underwrite policies surely may have deprived the appellants of some business. Yet it cannot be said that this fact alone corrupted the plan to the extent that it constituted an unreasonable restraint of trade. The Sherman Act protects competition, not competitors who may suffer some pecuniary harm because of the competitive process. A contrary decision would stand the Act on its head. Overall, the group insurance plan, with its competitive bidding, dividend plan, and employee safety and rehabilitation programs, increased competition in Hawaii's insurance market. *See* 405 F. Supp. at 111. Appellants' losses resulted from the initiative taken by appellees in developing a

better plan for workmen's compensation insurance, not from any artificial impediments to appellants' ability to do likewise or to otherwise compete in a reasonable way.

Furthermore, the appellants are not presently precluded from competing with Yamada and Oda. As we have already noted, INA has indicated that other insurance agents may write group policies for contractors, and it has already licensed one of the appellants for that purpose.

CONCLUSION

The appellants have raised a variety of other issues, but we do not reach them on this appeal. For the first time, they claim on appeal that the appellees have violated section 2 of the Sherman Act, 15 U.S.C. § 2 (19), by monopolizing and attempting to monopolize the sale of workmen's compensation insurance to Hawaiian electrical contractors. There were no allegations of section 2 violations in the complaint, but the District Court explored the possibility that appellants' motion for summary judgment could be construed to present a section 2 claim. *See* 405 F. Supp. at 112. We decline to address the issue because of its insufficient development in the trial court.

The District Court also determined that neither IBEW nor PECA were immune from antitrust liability because of the nonstatutory labor exemption, but that INA and PEIC were immune under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1970). 405 F. Supp. at 113, 114. In view of our decision that the District Court properly granted summary judgment for appellees on the antitrust issues, we do not review these rulings.

The order of the District Court is

AFFIRMED.

HUFSTEDLER, Circuit Judge, concurring and dissenting:

I concur in my brothers' conclusion that the insurance companies were entitled to judgment in their favor. I cannot agree that the remaining defendants were entitled to judgment because the existence of triable issues of material fact foreclosed that conclusion.

The gravamen of plaintiffs' complaint is that the defendants combined to coerce the electrical contractors of Hawaii, especially the non-members of the defendant electrical contractors' trade association to purchase their workmen's compensation insurance through a single agent, defendant Oda. The combination virtually excluded plaintiffs from becoming insurance agents in the electrical contractors' market for workmen's compensation policies. The pleadings adequately averred a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1) unless the defendants' program was immunized from antitrust liability either by the McCarran-Ferguson Act (15 U.S.C. §§ 1011-15) or by the so-called non-statutory labor exemption. Immunity under the former Act does not exist if the defendants used coercion in furtherance of their plan. Moreover, immunity under the non-statutory labor exemption does not exist unless Oda's role as sole agent of record was strictly necessary for the survival of the plan. The record reveals that triable issues of fact exist both in determining the existence or non-existence of coercion and in deciding whether the designation of a sole agent was essential to the survival of the plan. Accordingly, I would reverse the district court's judgment and remand the case as to all defendants, other than the insurance carriers, for trial on those two issues.

Defendant Local 1186, International Brotherhood of Electrical Workers (IBEW), whose business manager is defendant Akito Fujikawa, represents employees of electrical contractors in the State of Hawaii. Defendant Pacific Electrical Contractors Association (PECA), whose executive secretary is defendant Walter Oda, is the trade association of the Hawaiian electrical contractors. When this claim arose, 63 of the 128 electrical contractors in Hawaii were dues-paying members of

PECA. PECA negotiated with IBEW on behalf of all the electrical contractors in Hawaii. Their collective bargaining agreement covered the entire industry in the state. The remaining defendants are the Insurance Company of North America (INA), and its wholly-owned subsidiary, the Pacific Employers Insurance Company (PEIC), carriers of workmen's compensation insurance.

Plaintiffs are general agents and solicitors of insurance in Hawaii. General agents are companies authorized by insurance carriers to solicit applications for insurance and effectuate contracts. Solicitors are salesmen appointed by general agents to solicit insurance applications and to collect premiums on a commission basis. (*See* Haw. Rev. Stat. §§ 431-361, 431-363.)

During the course of the renegotiation of the IBEW-PECA collective bargaining agreement in the spring of 1973, the union proposed that the contractors change the method by which they obtained workmen's compensation insurance. Instead of having each contractor individually purchase insurance from one of the 22 carriers and through one of the 20 agencies servicing the electrical contractors' industry, IBEW urged that insurance be provided either through a Taft-Hartley trust fund, which would have effectively made the contractors self-insurers, or from a single carrier. After receiving the report of the Martin E. Segal Company (Segal), a consulting firm, IBEW discarded the trust fund idea and recommended the adoption of a "safety group" plan. Under the plan, insurance would be purchased centrally from one carrier. Premiums would be paid individually by each contractor according to the special experience of his business, but dividends would be calculated according to the safety record of the employers as a group. In September, 1973, IBEW officials met with the PECA Board of Directors, and the PECA directors agreed to recommend that the association's members adopt the safety group plan and mandate the participation of all employers covered by the collective bargaining agreement. In October, the membership of PECA met and approved the adoption of an amendment to Article XIX of the collective bargaining agreement establishing the safety group ("Association Dividend Group Plan") and requiring participation of all electrical contractors in the plan to be administered by PECA.

PECA and IBEW developed this insurance package in response to a variety of concerns. The union apparently believed that centralized administration of insurance would lead to better claims service through increased industry leverage with a single carrier and that a single insurer would have the incentive and the opportunity to create adequate safety and rehabilitation programs. The group plan was also expected to benefit the contractors. Insurance carriers were considered more likely to vote favorable dividends because of the large volume of business at stake, and the group calculation and payment of dividends meant that small employers, who paid premiums below the threshold hitherto necessary to entitle them to dividends, would now receive dividends. Segal predicted that total dividends under the plan would be 15 percent greater than the sum of the dividends the contractors were receiving individually.

However, the welfare of the employees and the contractors were not the IBEW's or the PECA's only interests. One of IBEW's purposes was to provide PECA with an additional source of income, particularly one which would enable the association to tithe non-member contractors. When faced with PECA's initial reluctance to accede to the single-carrier proposal, IBEW argued that the association could supplement its income by charging non-members a fee for administering the plan.[1] The dividends which the safety group plan would make available were soon seen as a means of supplementing PECA's income while penalizing contractors who continued to adhere to their non-member status. According to Oda, "Blackie's idea

[1]*See* Minutes of PECA Board of Directors meeting of May 23, 1973: "Mr. Fujikawa [the IBEW Business Manager] . . . feels that by charging the electrical contractors a fee for this service we could supplement our income. Furthermore, non-member contractors will be required to participate through the industry plan." *See also* Minutes of PECA directors meeting of September 27, 1973: "Since the non-association members would also be participating, this could be a means of assessing them for the services we provide." Letter of Oda to Berton Jacobson, Executive Vice President of Segal, October 19, 1973: "Blackie Fujikawa has stated that the Association Dividend Group Plan will be a means for the PECA to assess the non-members for the services we have been providing them throughout the years in negotiating and servicing their union agreement."

was to off-set dues payments by dividends and the non-members be required to forfeit their dividends since no credit can be extended towards dues contribution."[2] Dividends were not guaranteed and would not begin to be generated until a year or two after the plan was implemented. As Oda acknowledged, there was a serious "question of illegality in the allocation of dividends to dues, especially the forfeiture of dividends by non-members."

In contrast, commissions from the insurance carrier to the agent or solicitor are paid when premiums are paid by the insured. Commissions were guaranteed regardless of the safety record of the industry and would be available from the outset of the plan. A reasonable estimate of anticipated income could be made because premiums are prepaid. Oda had been a licensed insurance solicitor since 1957, although he was inactive during the years prior to the adoption of the safety group plan. IBEW and PECA proposed that Oda be made "agent of record" for the contractors' workmen's compensation insurance under the plan. Using his Yamada Insurance Agency, Ltd., Oda would write and sell group plan policies. The commissions he received, after taxes, would be paid over to PECA. PECA thus would receive the income of the insurance agent operating over the entire Hawaiian electrical contractors' industry, association members and non-members alike.

The union was solicitous of the welfare of the trade association, and it was convinced that an important aspect of the group plan was that it would provide PECA with sorely-needed income. When Fujikawa first broached the subject with PECA directors, in May, 1973, he prefaced his proposal by "express[ing] the concern that the PECA is going broke." (Minutes of May 23 meeting, *supra*.) IBEW's concern for the health of PECA and its willingness to help PECA financially through the joint development of the plans and through payments by non-member contractors predated the insurance controversy. In proposing the group plan, Oda wrote the IBEW local that the plan would "in some small measure, 'atone' for

[2]Letter of Oda to Jacobson, *supra*. *See also* Minutes of meeting of September 27, *supra*, "the dividends received could be allocated towards off-setting dues."

having promised us an Industry Promotion Fund, having it specified in the contract, but only to be overridden by the International Office [of the union]. It was intended to use the Promotion Fund concept to supplement our income as well as to assess the non-members their 'fair share' in managing this organization." (October 19 Letter to Jacobson, *supra*.) PECA and Oda were also aware that the trade association was in precarious financial shape and that the safety group plan might relieve that condition:

> "One of the incentive[s] for the PECA to undertake the program is supplemental income to off-set the declining reserves. Since the plumbers and sheet metal associations severed their affiliation with us two years ago, we have not been able to generate sufficient income to overcome the deficit."

(Letter of Oda to Jacobson, October 8, 1973.)

Amended Article XIX of the IBEW-PECA collective bargaining agreement said nothing about choosing insurance agencies to service the group plan or about the number of such agencies there would be. But it is apparent that IBEW and PECA contemplated that the workmen's compensation program would be set up as a "closed," rather than an "open" plan. "A closed program is one which has a single broker of record or agent—precluding participation by any other agent or broker—even though the other agent or broker might represent the same insurance company." (405 F. Supp. 99, 103.) Under an open plan any local agent or broker representing the carrier may place individual accounts within the program. (*Id.*) While it appears that all of the insurance in one workmen's compensation safety group plan must be written by one company, there is nothing in the nature of such a program that requires that all of the insurance be written through a single insurance agent. As a PEIC vice president wrote to an official of the company's San Francisco Service Office, "[a]ll of our Safety Groups are 'open' groups meaning that any properly licensed producer can place business in the group subject to our internal requirements." (Letter of Frank C. Collins, Vice President-Underwriting, to Donald Fey, March 8, 1974.) Neither INA nor PEIC saw any reason to mandate a closed group plan to assure the success of the program. On the con-

trary, upon notification of the PEIC's selection as the carrier for the electrical contractors' group plan, an INA official wrote to Segal "to go on record indicating that the above group will be an 'open' group as all our safety groups are." (Letter of Elmo Aghabeg, Manager, Workmen's Compensation Dep't, INA, to Jacobson, February 1, 1974.)

Despite the silence of the collective bargaining agreement, the opposition of INA/PEIC, and the lack of any structural need for a "closed" plan in the development or implementation of the safety group program, Oda responded to the financial imperatives of PECA and treated the plan as "closed." Benefiting from the symbiotic nature of his double role as executive secretary of PECA (and hence the administrator of the safety group, as designated by the union contract) and insurance solicitor, he wrote all of the signatory contractors on January 31, 1974, advising them that the terms of the new Article XIX of the collective bargaining agreement required their participation in the safety group plan. He sent them applications for INA policies and told them to return the completed applications to him. He asked that each contractor notify him as to the expiration date of its current workmen's compensation policy, and he sent numerous follow-up letters to the contractors who had not yet acquired group plan policies. Plaintiffs contend that Oda coerced contractors into purchasing INA/PEIC policies through him. Defendants characterize Oda's activities as nothing more serious than "aggressive solicitation," and they argue that while Oda advised contractors that the bargaining agreement required use of INA/PEIC as the carrier, Oda never told contractors that they had to buy their insurance through him. Whether or not the plan was technically "closed," Oda and PECA actively opposed allowing other insurance agents to write INA policies under the group plan. Trenor Thompson, the president of Bayly, Martin & Fay of Hawaii, Inc. (BMF), one of the plaintiffs herein and a licensed INA agent, attested that in June, 1974, a PECA representative told him that he "would not be allowed to sell or service workmen's compensation insurance business with any of the signatory contractors to the labor agreement . . . regardless of whether such insurance was placed with [PEIC]." (Affidavit of Trenor Thompson.) When INA subsequently af-

firmed that BMF would be allowed to process workmen's compensation insurance for Hawaiian electrical contractors, a Yamada official told BMF that its existing INA appointment was not enough and that an additional appointment from the PEIC was required. (Deposition of Thomas Takamune, President of Yamada.) According to BMF, by the time it was able to obtain that appointment, it had lost a client under the PECA plan to Oda and Yamada. Similarly, in July, 1974, Oda and PECA summarily rejected the proposal of Atlas Insurance Agency Ltd. that it also serve as agent of record under the group plan, with contractors having the right to choose freely between them. This was unacceptable, Oda wrote, because it "would defeat our secondary objective of using the earned commissions, less general excise and personal income taxes, to pay for part of our expenses."

Although a few agents other than Yamada/Oda did manage to sell INA/PEIC workmen's compensation insurance policies to electrical contractors, Oda's success in implementing a safety group plan effectively closed to all agents other than himself is manifest: Between February 1, 1974, and June 20, 1975, all but 14 of the 128 contractors bound by the IBEW-PECA collective bargaining agreement placed their INA/PEIC policies through Oda's Yamada agency.

I

If the plaintiff's antitrust attack were based upon a challenge to the single-carrier aspect of the safety group plan, I would share both the district court's and my colleagues' reluctance to endorse plaintiffs' assault on the plan. The plan has obvious benefits for both contractors and employees, open bidding was used for the selection of the single carrier, and several hundred such programs presently exist in the United States. Plaintiffs' attack, however, is not on the single carrier feature of the plan, but on defendants' alleged agreement to use Oda as the single agent.

Plaintiffs' contention is that the defendants combined to make Oda the sole insurance agent for all of the electrical contractors in Hawaii for the purpose of providing PECA with income from commissions generated by the sale of the policies

to all of the contractors, PECA members and non-members alike. They also claim that the defendants effectuated their "closed" plan by coercive means, such as threatening non-member contractors with IBEW reprisals if the non-members failed to authorize Oda to process their INA/PEIC applications. The result was, according to the plaintiffs, that they were denied access to the non-PECA contractors' market for INA/PEIC workmen's compensation policies.

Market foreclosure and coercion are the classic elements of a violation of Section 1 of the Sherman Act; collaborative conduct characterized by these factors is *per se* unlawful under the Act. (*See, e.g., United States v. General Motors Corp.* (1966) 384 U.S. 127; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.* (1961) 364 U.S. 656; *Klor's Inc. v. Broadway-Hale Stores, Inc.* (1959) 359 U.S. 207; *Helix Milling Co. v. Terminal Flour Mills Co.* (9th Cir. 1975) 523 F.2d 1317, 1320-21; *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee* (5th Cir. 1972) 467 F.2d 178, 186-87; 11 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* 76.02 at 76.11 to 76.12 (1977); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L.Rev. 847, 872-79 (1955).)

The collaborative conduct attacked does not fit snugly within any of the more familiar kinds of group boycotts. (405 F. Supp. 99, 107-08.) The combination being challenged is unusual and the imposition by a trade association and a union of a "closed" agency plan in the context of an insurance safety group program is novel. But the Sherman Act is "couched in broad terms . . . adaptable to the changing types of commercial production and distribution that have evolved since its passage." (*United States v. E. I. duPont de Nemours & Co.* (1956) 351 U.S. 377, 386.) No "all-fours" resemblance to arrangements previously held unlawful is necessary when the challenged combination is marked by the indicia of *per se* illegality:

> "The distinguishing feature of the group boycott cases is group action to coerce third parties to conform to the pattern of conduct desired by the group . . . Such action offends the concept of a free market because it places involuntary restraints on the trading opportunities of strangers to the group."

(Barber, *supra*, 103 U. Pa. L.Rev. at 875.)

In this case the "group" is composed of the defendants; the third parties coerced are the non-member contractors who, plaintiffs contend, were compelled to buy their INA/PEIC policies from Oda's Yamada agency; and the "strangers" whose trading opportunities have been restrained by defendants' activities are the plaintiff insurance agents who were denied access to the non-member contractors' market for workmen's compensation policies. As the Fifth Circuit has observed, "the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as 'naked restraints of trade,' and have fallen victims to the *per se* rule." (*E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, supra*, 467 F.2d at 187.) Plaintiffs contend that both exclusionary and coercive conduct on the part of the defendants are present. If they are right, *per se* illegality follows.

Although the interrelationships of the defendants and the context are unusual, the defendants' arrangement nevertheless resembles combinations that are characteristic of vertical boycotts. The district court found that there was no "vertical combination among INA at one level, and IBEW/PECA at the other, to exclude from the market one of their competitors." (405 F. Supp. at 108.) The district court apparently assumed that PECA was merely a trade association of electrical contractors which was not in competition with general agents in the insurance field. However, under the circumstances of this case, PECA was not just a trade association, nor was Oda simply a trade association's executive secretary. Within the structure of the safety group, Oda was an insurance solicitor selling INA/PEIC workmen's compensation policies to 114 of the 128 electrical contractors. PECA, as recipient of Oda's commissions, in a very real sense was in the insurance agency business. IBEW had a stake in PECA's fiscal welfare, and it was at least an incidental beneficiary of Oda's insurance sales.

PECA was not merely the passive beneficiary of the fortuitous circumstance that its executive secretary possessed an insurance solicitor's license and a generous disposition toward

his employer which led him to give it his commissions. Rather, the evidence demonstrates that PECA and IBEW implemented the plan with the idea that Oda would act as an insurance agent and turn over his commissions to the association; that PECA, through Oda, could use its position as administrator of the plan to maximize its insurance commission income by telling contractors (especially non-members of the association) to take out INA/PEIC policies through Oda using the leverage of the collective bargaining agreement. Oda/PECA were in both the electrical contractors' field and in plaintiffs' insurance solicitation business. This curious double role was used to promote their competitive position in the safety group insurance sales' market.

Once it is recognized that, through Oda, PECA was in the insurance sales' business, the resemblance of this arrangement to the classic vertical boycott model emerges. In *Klor's Inc. v. Broadway-Hale Stores, Inc., supra*, 359 U.S. 207, plaintiff Klor's, a small retail appliance store, charged that Broadway-Hale, a department store chain, had used its "'monopolistic' buying power" to obtain the agreement of the major manufacturers and distributors of appliances not to sell to Klor's, or to sell to it only at discriminatory prices. This foreclosure of one business by another from a market they both sought was held to be *per se* unlawful, because both the business excluded and the other businesses would no longer have the opportunity to deal with it:

> "Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever." (359 U.S. at 212-13.)

Klor's and Broadway-Hale were in competition for the purchase of appliances. Here, PECA, through Oda and with the support of IBEW, is in competition with plaintiffs in the sale of INA/PEIC workmen's compensation policies to members of the safety group. Defendants' combination has effectively

driven plaintiffs out of business as insurance agents with respect to the contractors' workmen's compensation policies, and it has deprived the contractors—especially those who are not members of PECA and therefore lack any stake in providing the association with additional sources of income—of their freedom to buy their INA/PEIC policies from the agents of their choice.

If proved, the twin evils of coercion and market foreclosure would together be sufficient to render defendants' arrangement *per se* unlawful. The district court appeared to assume that there was an implicit agreement to use Oda as the exclusive agent under the group plan (405 F. Supp. at 109), but it held that no *per se* violation existed because the impact on plaintiffs was unintentional. It was the incidental result of the otherwise salutary group plan, and not the product of an anticompetitive motive. Applying *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.* (9th Cir. 1969) 416 F.2d 71 (agreements having the effect of excluding a party from a market are not *per se* unlawful where the exclusion was a "merely incidental result" of actions aimed at attaining a legitimate business objective), the district court found that the "closed" agency arrangement presented no *per se* violation and proceeded to test it according to the "rule of reason."

By its very terms, however, *Hawaiian Oke* is inapposite. In *Hawaiian Oke*, two liquor manufacturers agreed that in order to obtain improved distribution services, they would transfer their exclusive distributorships from the plaintiff to another distributor. We held that that agreement was not a *per se* violation of the Sherman Act. The holding in *Hawaiian Oke* was contingent on the finding that defendants' agreement had no "adverse purpose or effect on competition." (416 F.2d at 78.) A combination which is anticompetitive in purpose or effect, however, does constitute an unreasonable restraint of trade in violation of the Sherman Act. (*See, e.g., Fount-Wip, Inc. v. Reddi-Wip, Inc.* (9th Cir. Feb. 6, 1978) ___ F.2d ___, ___ [Slip Op'n. 406, 410-11]; *Mutual Fund Investors, Inc. v. Putnam Management Co.* (9th Cir. 1977) 553 F.2d 620, 626; *Bushie v. Stenocord* (9th Cir. 1972) 460 F.2d 116, 119.)

Plaintiffs here contend that defendants' combination was anticompetitive both in effect and in intent. The exclusionary

effects of defendants' activities are clear: only 14 of the 128 electrical contractors in Hawaii bought their INA/PEIC insurance from an agent other than Oda. Bearing in mind the Supreme Court's admonition that "[e]limination, by joint collaborative action, . . . from access to the market is a per se violation of the [Sherman] Act" (*United States v. General Motors Corp.* (1966) 384 U.S. 127, 145), we have been particularly sensitive to the antitrust implications of agreements which have resulted in the virtual exclusion from the relevant market of those businesses which are not parties to the challenged combination. (*See, e.g., Helix Milling Co. v. Terminal Flour Mills Co., supra,* / / / 523 F.2d at 1320-22.)

The exclusionary effect of defendants' combination was not the incidental consequence of actions designed to attain the legitimate business objective of the safety group. As INA has reiterated in its communications to Segal, Oda and PECA, a closed agency arrangement is not a pre-requisite for the success of a safety group, most safety groups are in fact "open," and INA apparently opposed Oda's efforts to impose a closed situation. Because an exclusive agency was not normally a part of a safety group plan, it cannot be concluded at this summary state that the exclusive agency was an unintentional aspect of the safety group, or an incidental consequence of the other arrangements. The novelty of the closed agency aspect of this arrangement suggests that exclusion was intended. Moreover, the communications among IBEW, PECA, and Segal indicate that PECA's opportunity of reaping commission income was a definite consideration in the minds of the principal actors—a reinforcement of the inference that the closed aspect of the insurance solicitation was intentional.

An intent to exclude is "anticompetitive." Oda/PECA may not have intended to drive the plaintiffs out of this business, and they may have had no animosity specifically directed against any of the plaintiffs. But, within the limited context of the sale of workmen's compensation insurance to electrical contractors, plaintiffs and Oda/PECA were in competition. To the extent that defendants' combination was designed to enable Oda/PECA to capture the contractors' market in INA/PEIC policies, it was equally aimed at excluding the plaintiffs from that market. "It is . . . not always necessary to find a

specific intent to restrain trade . . . in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade . . . results as the consequence of a defendant's conduct or business arrangements." (*United States v. Griffith* (1948) 334 U.S. 100, 105.) As we recently explained, proof of anticompetitive motivation does not require a showing that defendants intended to harm a competitor. (*United States v. Hilton Hotels Corp.* (9th Cir. 1972) 467 F.2d 1000, 1002-03.)

In *Hilton Hotels*, the hotels, restaurants, and hotel and restaurant supply companies of Portland, Oregon, had organized an association to attract conventions to the city. To finance the operations of the association, they required members to make certain contributions and, to enforce that requirement, the hotels agreed to curtail purchases from those suppliers who failed to make their contributions. Although we concluded that the sole purpose of defendants' refusal to deal was " 'to bring convention dollars into Portland' . . . [,] the necessary and direct consequence of defendants' scheme was to deprive uncooperative suppliers of the opportunity to sell to defendant hotels . . . and to deprive defendant hotels of the opportunity to buy supplies from such suppliers . . . *Defendants therefore 'intended' to impose their restraints upon competition in the only sense relevant here.*" (Id. at 1002.) (emphasis added)

Although the purpose of defendants' combination may have been only to provide PECA with additional financial support to help it perform its various functions on behalf of the electrical contractors' industry, the "necessary and direct consequence" of their action was to restrain the trading opportunities of both the contractors and the plaintiff insurance agents. Thus, the anticompetitive effects of the closed agency relationship were clearly "intended." (*See also Albrecht v. Herald Co.* (1968) 390 U.S. 145, 149-50 (plaintiff independent newspaper carrier sued publisher who terminated his distributorship when plaintiff sold newspapers at a price higher than that set by the publisher; publisher hired a solicitation agency to induce newspaper readers to transfer their allegiance to another carrier; and publisher gave customers solicited by the agency to a second carrier; plaintiff's antitrust action was upheld against the combination of publisher, solicitation agency, and second

carrier although the agency's only purpose "was undoubtedly to earn its fee"); *cf. Fashion Originator's Guild of America, Inc. v. FTC* (1941) 312 U.S. 457, 467-68 (horizontal combination organized to combat style piracy in fashion industry "intended" the anticompetitive effect of boycotting retailers who dealt with style pirates).)

The presence of anticompetitive intent and effects would alone be sufficient to distinguish this case from *Hawaiian Oke* and to constitute a *prima facie* case of an unlawful restraint of trade. Plaintiffs' assertion that defendants effectuated this restraint through coercion renders *Hawaiian Oke* inapposite, and, if coercion were proved at trial, would require treating defendants' arrangement as unreasonable *per se*. In *Hawaiian Oke*, defendants' agreement to switch distributorships was voluntary. Plaintiff presented no evidence that coercion played any role in the parties' dealings with each other. (416 F.2d at 78. *Accord Bridge Corp. of America v. American Contract Bridge League, Inc.* (9th Cir. 1970) 428 F.2d 1365, 1369-70 (*Hawaiian Oke* applicable because plaintiffs did not argue that defendants "combined . . . for the . . . purpose of coercing . . ."). Plaintiffs here contend that PECA was in direct competition for the insurance sales of the contractors belonging to the safety group. The gravamen of plaintiffs' claim is that the choice of Oda as insurance agent was imposed by the IBEW/PECA combination, and it was not the result of any voluntary choice among the contractors. The coercion element transforms defendants' combination from an arguably unreasonable one into one which is unlawful *per se*.

The pivotal question is whether the record before the district court showed that the coercion issue presented no triable issue of fact. Of course, plaintiffs have the burden of proving coercion because that element is essential both to defeat the defendants' immunity arguments and to support the plaintiffs' claim of a *per se* violation. On summary judgment, however, the burden was upon the defendants, who moved for summary judgment, clearly to establish the non-existence of any genuine issue of fact material to judgment in their favor. (*E.g., SEC v. Koracorp Industries, Inc.* (9th Cir. 1978) ____F.2d____, ____ [Nos. 76-2547/2964 Slip Op'n Feb. 6, 1978 at 400]; 6 Pt. 2 J. Moore, *Federal Practice* ¶ 56.15[4], p. 56-511; id. ¶ 56.15[8], p. 56-643.) Defendants, other than the insurance carriers, failed to carry that burden. The burden is especially difficult to meet when the material fact asserted to be in dispute is coercion, because proof of that issue turns on such subjective factors as defendants' motives and intent, the credibility of their assertions, and contractors' reasonable perceptions of defendants' conduct. (*Poller v. Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464, 473.) Plaintiffs have articulated the basis of their claim for violation of the Sherman Act and they have succeeded in producing enough evidence to raise a triable issue with respect to coercion.

II

I next turn to the question whether the defendants were immunized from antitrust liability under the McCarran-Ferguson Act (15 U.S.C. §§ 1011-15). The Act was passed in response to *United States v. South-Eastern Underwriters Association* (1944) 322 U.S. 533. Before *South-Eastern Underwriters*, issuing a policy of insurance was not thought to be a "transaction of commerce." (*Paul v. Virginia* (1869) 75 U.S. (8 Wall.) 168, 183.) When the Supreme Court decided that insurance transactions were subject to federal regulation under the commerce clause and that the antitrust laws were applicable to them, Congress enacted the McCarran-Ferguson Act. The Act states that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." (15 U.S.C. § 1011.) "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." (*Prudential Insurance Company v. Benjamin* (1946) 328 U.S. 408, 429.)

The McCarran-Ferguson Act's exemption of the insurance business is fitful. The Act provides that the antitrust laws "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." (15 U.S.C. § 1012(b).) The Act also provides that the Sherman Act would remain applicable to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." (15 U.S.C. § 1013(b).) We need not dwell upon whether the acts

alleged to violate the antitrust laws were part of the "business of insurance," or whether the business of insurance was "regulated by State law," because the plaintiffs have alleged sufficient facts to bring them within the coercion exclusion from the exemption. (*E.g.*, / / /

prices cannot be shielded from antitrust liability by the labor exemption); *Allen Bradley*, *supra*, 325 U.S. at 809 (a union may not seek to increase job opportunities for its members by combining with employers to eliminate the employers' competitors from the market); *Bodine Produce, Inc. v. United Farm Workers Organizing Comm.* (9th Cir. 1974) 494 F.2d 541, 551 ("union cooperation which enables one or more employers to obtain control of the supply and price of a certain product in a particular market, or to make possible the elimination of troublesome competition, is unmistakably tainted"); P. Areeda, *Antitrust Analysis* (2d ed. 1974) at 104 ("there is no exemption where the union agrees with one or more employers to deny competing employers access to the market").)

Second, a union may not combine with one set of employers and agree to impose terms of a union-employer accord on other employers who are competitors of the first employers and not parties to the agreement. This principle emerged in *Pennington* where the complaint charged that the UMW had conspired with the large coal operators to eliminate the smaller companies by agreeing to impose the terms of the 1950 Wage Agreement existing between the large operators and the union on all the coal companies regardless of a particular company's ability to pay. Although the Court found that the agreement concerned wages "the very heart of those subjects about which employers and unions must bargain" and that the effect on the product market "results from the elimination of competition based on wages . . . which is not the kind of restraint Congress intended the Sherman Act to proscribe" (381 U.S. at 664), the agreement to impose the wage terms on the small coal operators was held subject to the antitrust laws because it operated directly on employers who were not parties to the agreement.[4]

[4]The Eighth Circuit has generalized the rule in *Pennington* into a principle requiring that a restraint on trade which results from a union-employer agreement must "primarily affect only the parties to the collective bargaining relationship." (Mackey v. National Football League (8th Cir. 1976) 543 F.2d 606, 614. *See also* Connell Construction, *supra*, 421 U.S. at 624-26 (union-employer agreement had significant affect [*sic*] on employer who had no collective bargaining relationship with the union and had no employees that the union sought to represent).)

Third, where an agreement has an immediate impact on the product market, federal labor policy is implicated sufficiently to prevail and to protect the agreement from antitrust liability only where the agreement directly concerns a mandatory subject of bargaining. (*See Jewel Tea*, *supra*, 381 U.S. at 680; *Pennington*, *supra*, 381 U.S. at 665; *Mackey*, *supra*, 543 F.2d at 614.) But the fact that a restriction on competition is "intimately related" to the attainment of a legitimate labor goal, even if it is a mandatory subject of bargaining, while a necessary prerequisite to the labor exemption is not a sufficient condition. (*Pennington*, *supra*, 381 U.S. at 664-65 ("This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining . . ."). *See also Jewel Tea*, *supra*, 381 U.S. at 694; *but cf. Jewel Tea*, *id.* at 732-33 (Goldberg, J., concurring, would exempt all agreements directly concerning mandatory subjects of bargaining).)

Where an agreement has both a direct and substantial impact on competition among businessmen and an immediate and concrete effect on a mandatory subject of bargaining, the Court has first determined whether the agreement's anticompetitive effect is an incidental, derivative consequence of the effort to effectuate labor's legitimate objective, or, rather, whether the anticompetitive effect is independent of the restriction directly necessary to serve labor's concerns. The application of this "least restrictive means" approach is illustrated in *Jewel Tea*. There, a Chicago retail meat market chain sued seven union locals and the Chicago area association of retail food stores, alleging that the defendants had conspired to restrain competition among the retail meat markets by limiting the marketing hours for the sale of fresh meat, through a clause in the collective bargaining agreement between the association and the union and in the agreement between the plaintiff and the unions. Jewel Tea contended that the purpose of the marketing hours restriction was to aid small butcher shops by preventing self-service meat markets, like plaintiff's, from operating at night when the smaller shops were closed. The Court decided that the effect of the restriction on competition in the meat marketing business was "apparent and real."

(381 U.S. at 691.) Unlike *Pennington*, the Court found there was no claim that the union and small shop owners had conspired together to impose the marketing restrictions on Jewel Tea. (*Id.* at 688.) Turning to the labor aspect of the agreement, the Court concluded that the specific hours of employment, as well as the number of hours, were a component of the working hours which had been considered a mandatory subject of bargaining. The marketing hours restriction thus operated in an area where "the concern of union members is immediate and direct." (*Id.* at 691.) The question for the Court then became one of fact: Were night operations feasible without butchers and without infringing on butchers' interests? If so, then the agreement was overbroad because it went beyond the direct implementation of butchers' concerns and unnecessarily restricted competition. If not, the anti-competitive consequence was simply a derivative, incidental result of the union's legitimate effort to fix the hours of work. Adopting the district court's conclusion that night operations without butchers were infeasible, the Court held that the labor exemption was available to shield the marketing hours clause from antitrust liability. (*Id.* at 694-97.) *See also Connell Construction, supra.* 421 U.S. at 624 (agreement had "significant adverse effects on the market and on consumers—effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions.").)

IBEW's alleged agreement with the insurance carriers and with PECA, together with PECA's arrangement with Oda, had a direct and immediate effect of excluding plaintiffs from the relevant market. This arrangment operated to deny plaintiffs, who were Oda/PECA's competitors, access to the non-PECA contractors. That agreement is "unmistakably tainted." (*Bodine Produce, Inc. v. United Farm Workers Organizing Comm., supra,* 494 F.2d at 551. *Accord Allen Bradley Co. v. Local Union No. 3, IBEW, supra,* 325 U.S. 797.) The restraint on trade primarily affected non-parties to the agreement. Plaintiffs contend that the arrangement was nothing more than an effort by IBEW and PECA to coerce the non-PECA contractors into purchasing their insurance through Oda. Although one aspect of this arrangement was that Oda/PECA were in competition with plaintiffs for insurance business within the context of the safety group, PECA contractors were normally in competition with non-PECA contractors in respect of every other phase of their contracting businesses. The closed agency agreement directly benefited PECA members by providing the association with additional income and by making possible a reduction in PECA dues. No similar direct benefits resulted to non-members. Therefore, one consequence of the agreement was to make PECA membership more attractive. Although the competitive advantage occurring to PECA members from a reduction in the dues obligation might be small, the closed agency arrangement did tend to strengthen the position of PECA and of PECA members, thereby potentially restraining competition in the electrical contractors' field as well as in the insurance agents' business. Thus, here, as in *Pennington*, the inference can be drawn that the arrangement was an effort by a union and one group of employers to impose a requirement on the employers' competitors.

It is well established that the benefits of an insurance program are among the "non-wage" conditions of employment which have been considered mandatory subjects of bargaining. (*See Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Div.* (1971) 404 U.S. 157, 159; *Inland Steel Co. v. NLRB* (7th Cir. 1948) 170 F.2d 247, 251 (accepting the Board's conclusion "that the term 'wages' . . . must be construed to include emoluments of value, like pension and insurance benefits which may accrue to employees out of their employment relationship").) Whether the selection of the insurance agent for a workmen's compensation program is also a mandatory subject of bargaining turns on whether the benefits available under the insurance scheme are inextricably bound up with the identity of the insurance agent. (*Cf. Oil, Chemical & Atomic Workers v. NLRB* (D.C. Cir. 1976) 547 F.2d 575, 582 n.6; *Connecticut Light & Power Co. v. NLRB* (2d Cir. 1973) 476 F.2d 1079, 1082-83 (only where identity of insurance carrier is closely bound up with benefits available under insurance plan is the selection of a carrier a mandatory subject of bargaining); *Bastian-Blessing, Div. of Golconda Corp. v. NLRB* (6th Cir. 1973) 474 F.2d 49, 54 ("We have sought to find a way to separate the carrier from the

benefits in this case, and we have failed. . . . Under these facts, the Board's remedy that the benefits be restored by restoring 'the preexisting . . . plan' as a single 'ball of wax' appears justified.").)

We are then left with the question whether Oda's role, as a conduit through which commissions flowed to PECA was essential to the safety group program. If that question is answered affirmatively, then the PECA/IBEW agreement has a "direct and concrete" impact on a labor subject, and its anticompetitive effects are no more than the incidental, derivative consequences of the "labor" aspect of the agreement. If the question is answered negatively, then the closed agency arrangement has at best an indirect effect on attaining legitimate labor goals and its harmful impact on competition is far greater and more immediate than is necessary to serve labor interests.

In my view, the record before us is inadequate to provide a definitive answer to that critical question. The district court did not expressly address the issue. Although the court earlier said that the labor exemption provided no protection for the IBEW/PECA plan (405 F. Supp. at 113), the court earlier found it "clear from plaintiffs' evidence that a single broker or solicitor must coordinate the group plan if it is to achieve all of the objectives previously cited," and further that it was "laudatory" that the coordinating broker should be willing to use his profits to cover the expenses of the program. But the only evidence that the court cited in support of its conclusion that a single broker was needed was a statement of a vice president of one of the insurance agent plaintiffs explaining that group plans may be set up on either an open or a closed basis. (*See* 405 F. Supp. at 111, nn.50 & 51 and at 103, n. 11.) The only other evidence in the record is the repeated assertion by INA that an exclusive agent of record is not a necessary prerequisite to the success of a group plan. On remand, I would have the district court consider whether Oda's role is "so intimately related" (*Jewel Tea, supra*, 381 U.S. at 689) to the administration of plan [*sic*] as to render it necessary and further to consider whether the anti-competitive consequences of the agreement in two product markets are justified on the ground that Oda's role was strictly necessary to the survival of a plan beneficial to the union members.

III

I concur with the majority's conclusion that the insurance carrier defendants were properly granted summary judgment. INA/PEIC did not participate in any of the discussions in 1973 among IBEW, PECA, and Segal, concerning the desirability of a safety group plan, the various methods of establishing the program, and the possible benefits which the scheme might have in improving PECA's deteriorating financial condition. The insurance carriers did not enter the picture until after the end of the year when INA/PEIC submitted its bid to be carrier for the safety group. INA played no role whatever in giving Oda an exclusive agency relationship. Indeed, it has sold safety group policies through other agencies when those other agents were available. The company has never indicated any interest in providing Oda with an exclusive designation, and it had nothing to gain from such an arrangement. Indeed, it may have stood to lose goodwill of other Hawaiian insurance agents, who sold other kinds of INA policies. From the time INA received notification that it would be the carrier for the safety group, it has repeatedly insisted that the group be an open one. It communicated this thought to Segal, to Oda, to the PEIC San Francisco office, to Yamada, and to PECA's attorney. (405 F. Supp. at 106.) In short, there is no evidence in the record suggesting that INA/PEIC were in any way active in a scheme to make Oda the exclusive agent for the safety group or that they took any other steps to further the scheme.

The union and trade association defendants present a very different picture. As to them, there is substantial evidence that they combined with the common goal of utilizing the safety group scheme as means of providing the association with new income. They jointly decided to make Oda the agent of record in order to further that purpose. The union denied that it played any role in inducing contractors to purchase their insurance through Oda or that it threatened any contractor with labor trouble, or the institution of grievance proceedings, if any particular firm failed to place insurance through Oda. However, plaintiffs need not prove that the union acted coercively to implement the PECA/IBEW plan. "Proof of participation in a course of conduct that has the necessary consequence of barring entry of competition into the market would

provide the basis for a finding of a combination." (*Helix Milling Co. v. Terminal Flour Mills Co., supra*, 523 F.2d at 1322, *citing Albrecht v. Herald Co.* (1968) 390 U.S. 145, 149-50.) The district court correctly decided that plaintiffs have shown that the union and the trade association participated in a common plan to use Oda's position to enable PECA to derive income from the project.

For purpose of resisting summary judgment, the record contains enough evidence, together with inferences necessarily drawn in favor of the plaintiffs, to show a triable issue of fact in respect of claimed coercion. To be sure, Oda's dealings with non-PECA contractors who were reluctant to buy insurance through Oda were not explicitly coercive. But when these dealings are viewed in the context of the contractors' relationship to him and to PECA, an inference arises that coercion was implicit. In his role as executive secretary of the trade association which normally bargained with the union on behalf of the contractors, he appeared to be a disinterested person advising the contractors who were confused about their obligations with respect to workmen's compensation. Oda answered those questions through a steady stream of letters and telephone calls in which he told the contractors that the union contract required them to take INA/PEIC policies, and he warned them that the failure to do so left them "in violation of your union contract." He sent them INA applications and repeated follow-up letters, and directed each of them to return the application to him. The inference arises that Oda, at some point along the line, dropped his role as disinterested advisor and became the highly interested insurance solicitor. The duality of his role was matched by PECA. PECA changed from a trade association representing the interests of all the contractors in their dealings with the union into a membership organization seeking financial support from the business of non-members. The course of dealing both by Oda and by PECA was deceptive, and the inference is certainly permissible, if not absolutely compelling, that both the intent and the effect were coercive.

I would reverse the grant of summary judgment in favor of IBEW, PECA, Oda, and Fujikawa and remand the case for trial against those defendants.

APPENDIX B

Opinion of Judge Dick Yin Wong

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ACKERMAN-CHILLINGWORTH, Division of MARSH & McLENNAN, Incorporated, a Delware corporation; ALEXANDER OF HAWAII, INC., dba-MID-PACIFIC INSURANCE DIVISION, a Hawaii corporation; AMERICAN MUTUAL UNDERWRITERS, LTD., a Hawaii corporation; ATLAS INSURANCE AGENCY, LTD., a Hawaii corporation; BAYLY, MARTIN & FAY OF HAWAII, INC., a Hawaii corporation; DAVIES INSURANCE AGENCIES, INC., a Hawaii corporation; STANLEY S. HASHIMOTO: OCCIDENTAL UNDERWRITERS OF HAWAII, LTD., a Hawaii corporation; JACK T. OSAKODA; and RAYMOND T. TANAKA,

Plaintiffs,

vs.

PACIFIC ELECTRICAL CONTRACTORS ASSOCIATION, a Hawaii non-profit corporation; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 1186; PACIFIC EMPLOYERS INSURANCE COMPANY, a California corporation; THE INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation, WALTER T. ODA and ANTONE FUJIKAWA,

Defendants.

) Civil No. 74-217

DECISION

Plaintiffs are general agents[1] and solicitors[2] of insurance in Hawaii. Defendants are the Pacific Electrical Contractors Association (PECA), and its Executive Secretary, Walter T. Oda; the International Brotherhood of Electrical Workers Local 1186 (IBEW), and its Business Manager, Akito Fujikawa; the Insurance Company of North America (INA), and its wholly-owned subsidiary, Pacific Employers Insurance Company (PEIC), a California corporation.

The parties agree that in October 1973 the IBEW and PECA amended their collective bargaining agreement to require that all signatories participate in an "Association Dividend Group Plan" to provide for workmen's compensation insurance. The plaintiffs allege that pursuant to the labor agreement defendants IBEW, PECA, and INA entered a conspiracy to require the PECA members to purchase workmen's compensation insurance solely from INA and/or PEIC, in violation of § 1 of the Sherman Act, 15 U.S.C.A. § 1 (1973).[3]

In a second count, plaintiffs allege that the amended collective bargaining agreement is prohibited by § 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158(e) (1973).[4]

After extensive discovery,[5] both sides filed cross-motions

[1]General agents are authorized by insurance companies to solicit applications for insurance and effectuate contracts. *See* Haw. Rev. Stat. § 431-361.

[2]Solicitors are salesmen appointed by general agents primarily to solicit applications for insurance and to collect premiums on a commission basis. *See* Haw. Rev. Stat. § 431-363.

[3]Plaintiffs also alleged violation of § 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45(a) (1) (1973), but did not prosecute this cause of action in their moving papers or at oral argument. Likewise, plaintiffs have dropped *sub silentio* a pendent state antitrust claim.

[4]This Court has jurisdiction over the labor law questions involved in the suit collateral to the antitrust issues, as well as under § 303 of the Labor Management Relations Act, 29 U.S.C.A. § 187 (1973). *Connell Constr. Co. v. Plumbers Local 100*, 43 U.S.L.W. 4657, 4660, 4668 (U.S. June 3, 1975).

[5]Over a thousand pages of documents were produced and catalogued.

for summary judgment on plaintiffs' claims.[6] Since this Court finds that there is no issue over any material fact, the case is ripe for summary adjudication.

SUMMARY OF FACTS

A. General industry background

There are approximately 120 electrical contractors in Hawaii, about half of whom are members of the PECA. Most or all contractors have signed a collective bargaining agreement with the IBEW, negotiated for all the contractors by the PECA. Prior to 1974, the contractors purchased their workmen's compensation insurance from numerous insurance carriers, through many different agencies.[7]

Several aspects of state insurance law dampen rate competition among carriers. Hawaii statute requires insurers to file their rates with the Insurance Commissioner. Most insurers satisfy this obligation by subscribing to rating bureau, which files the same rates on behalf of all of its members. *See* Haw. Rev. Stat. § 432-694.[8] Furthermore, insurers may not give preferred premium rates to group purchasers. Haw. Rev. Stat. § 431-693(a)(5).

The practice of dividend issue somewhat allays these anticompetitive factors. Some months after the expiration of a policy, the carrier's board of directors determines whether a dividend may be declared, based on the size of the insured's claims and the insurer's costs. However, carriers generally do

[6]The PECA and Oda counterclaimed that plaintiffs and others conspired to thwart defendants' group approach to workmen's compensation insurance, and attempted to monopolize trade in workmen's compensation insurance, in violation of §§ 1 and 2 of the Sherman Act. Similar causes of action were alleged in *M & I Electric Co. v. Ackerman-Chillingworth*, Civ. 74-306 (D. Haw. filed Dec. 10, 1974), which was consolidated with the instant case for pretrial motions. Neither the counterclaim in this case nor the claim in 74-306 are currently before the Court.

[7]At one time, according to an undated document, there were 22 carriers and 20 agencies writing 68 policies for the PECA. Doc. 2301.

[8]The uniformity of workmen's compensation insurance rates is attested by the fact that the premium rate was never the subject of discussion between any of the insureds or insurers in this action. *See* Doc. 197-200, 204-11, 2013-15.

not issue dividends to small employers who pay premiums below a certain threshhold.

Groups of employers in the same occupational area are allowed to form "safety groups" and purchase their insurance from a single carrier. Safety groups must be open to all employers in the industry. They play a large role in workmen's compensation coverage on the mainland[9] but, until the defendants' initiative, were uncommon in Hawaii. Safety groups are designed to provide a mechanism for employers, workers, and insurance companies to cooperate to reduce occupational hazards and to improve rehabilitation programs.

Group purchase of insurance allows reductions in the cost of insurance in an otherwise relatively noncompetitive industry in several ways. First, increased effectiveness of safety and rehabilitation programs reduces the size of premiums (still calculated on an individual employer basis). Second, carriers are more likely to vote favorable dividends when they know they might otherwise lose a large volume of business to a competitor. Although carriers are not allowed to guarantee dividends in advance, they may tell a prospective customer what their past practices have been and what their *minimum* retention will be in the future. Third, dividends can be calculated on the combined experience of the employers and this results in payment of dividends (if at all) to every employer, regardless of size. In an industry of small employers,[10] this latter factor is likely to be very important.

Samuel Alcorn, National Vice-President of Bayly, Martin & Fay, described group plans in the following terms:[11]

> The customary desire of an association to go into a group Workmen's Compensation program is to have a means to achieve lower costs for its members by bargaining for the entire group with an insurance carrier.

[9] Doc. 2446-53. There are approximately 50 national groups, 170 in California, and 10 in other Western states.

[10] Approximately half of the contractors paid premiums under $5,000. Doc. 2301.

[11] Doc. 1129-32 (emphasis added). Bayly, Martin & Fay of Hawaii, one of the plaintiffs herein, received Alcorn's letter.

> Such programs generally have their greatest appeal to members with small or medium sized premiums. . . .
>
> . . . .
>
> We have not run into programs in the past where participation in an association program was mandatory. To the contrary, *most associations are opposed to being obligated to have all of their members under the sponsored insurance program [because] lousy operators . . . could drag down the success of a good association program.*
>
> . . . .
>
> Group Workmen's Compensation programs can be set up on a "closed" basis or on an "open" basis.
>
> A closed program is one which has a single broker of record or agent—precluding participation by any other agent or broker—even though the other agent or broker might represent the same insurance company.
>
> The open plan is an override to the originating broker, but permits any local agent or broker representing the insurance company to place individual accounts within the program.

The originating or coordinating broker earns his override by counseling the association's safety committee, working with the carrier to establish a good safety program, keeping records on losses and processing claims, coordinating credit plans for premium payment, and auditing the carrier's claims file to assure that there is a fair basis for dividend computation.

B. The union proposals

In May 1973 the IBEW made contract-renewal proposals on wage and fringe levels and other matters. The union included a proposal that workmen's compensation insurance be provided through a Taft-Hartley trust fund or by purchase from a single carrier.[12] Under the former approach, the contractors would, in effect, have been self-insurers. Either approach would be to the employees' advantage, the IBEW believed, for two sets of reasons: centralized administration of insurance would lead to better claims service, either through increased industry leverage with a single carrier, or by sym-

[12] Exhibits B and C to Affidavit of Walter T. Oda; Doc. 510-11.

pathetic trusteeship administration; and a single insurer would have both the incentives and the opportunity to create adequate safety and rehabilitation programs.[13]

At first the PECA was reluctant to accede to the single-carrier proposal even though the IBEW argued that the Association could supplement its income by charging a fee for administration, and that individual members might also benefit by reduced rates. The membership, however, did agree to amend Article 19 of the collective bargaining agreement so that it endorsed the principle of a trust fund to provide workmen's compensation.[14]

The Martin E. Segal Company, consultants that had provided the IBEW and PECA with technical assistance in the insurance field since 1962, helped survey the contractors' existing insurance practices. In September 1973, it recommended against a Taft-Hartley type of trust fund, and in favor of a group plan. Under the plan, eventually adopted in major terms,the individual contractors would continue to pay premiums based solely on factors unique to their business, *e.g.*, type of work, volume of payroll, and safety record. However, the experience of all employers would determine the calculation of dividends. The Segal Company believed that total dividends under the plan would be greater than the sum of dividends the contractors were currently earning.[15]

William D. White, of the Segal Company, concluded that the group plan provided a means of accomplishing many of the Taft-Hartley trust fund goals, including:

1. Centralized purchasing from one insurer.
2. An opportunity for the Association to play a greater role in administering the Workmen's Compensation insurance program.

[13]The defendants' motivations were recorded in various documents prepared long before there was a hint of litigation, *e.g.*, Doc. 510-11 (minutes of the PECA Board of Directors, May 23, 1973).

Even though monetary benefit levels as such would not be increased directly, the union considered these factors to be important to the workers' welfare.

[14]Doc. 497. There were 89 affirmative votes, with no indication of how many of the approximately 120 contractors attended.

[15]Doc. 249-50.

3. Better service from the insurer.
4. A more generous dividend plan whereby all Association members would ultimately realize savings based on safety efforts and reduced insurance company expenses.[16]

C. Membership approval

At meetings in September with the IBEW and in October 1973, the PECA Board of Directors agreed to recommend the group plan to its membership, with the required participation of all signatory employers. A report by the Association's Executive Secretary Oda suggested that the "dividends received could be allocated towards off-setting PECA dues. Since the non-association members would also be participating, this could be a means of assessing them for the services we provide."[17] Nevertheless, Oda's report continued, "The primary objective of the Fund, besides better quality service, faster claim processing, cooperation in industry safety programs, etc., is to strive for a lesser rate to each participating contractor."[18]

Oda has been a licensed insurance solicitor since 1957, although he was inactive in recent years prior to these events. Because reimbursement to the Association for its expenses in operating the group plan by allocation of dividends would be both uncertain and delayed, it was suggested that Oda could sell and write polices and credit his net commissions (after personal taxes) to the PECA.[19]

The Board placed discussion of the proposed group plan on the agenda of the membership meeting of October 26, 1973, and invited non-member contractors to attend, since the plan would also affect them. Berton Jacobson, Executive Vice-President of the Segal Company, explained why the Taft-Hartley type of trust fund, specified in the existing Article 19

[16]Doc. 2477.

[17]Doc. 72.

[18]Doc. 76.

[19]*See* Doc. 495, 573. A phrase used throughout the minutes of the PECA Board is Oda "could be named agent of record for commission purposes." The "agent of record" is an industry term for the solicitor who sells a particular policy to a particular customer.

on Workmen's Compensation, was not feasible. He explained the proposed Association Dividend Group Plan and its mandatory nature.[20] The membership approved the following amendment to Article 19:

> Section 1. The parties agree that present practices and procedures for compensation of employees for occupational illness and injuries are unsatisfactory, and require substantial improvement.
>
> Section 2. The parties agree that all Employers will participate in an "Association Dividend Group Plan" providing for workmen's compensation insurance coverage for their employees, as recommended by the actuary designated by the parties. The Plan will be administered by PECA. The Union shall be consulted by PECA prior to making any important policy decisions which may affect the employees.
>
> Section 3. The Plan shall be initiated February 1, 1974.[21]

D. Implementation of the group plan

The Segal Company sent a specification letter to nine insurance carriers seeking bids for the workmen's compensation coverage of all signatory electrical contractors.[22] The letter sought written proposals regarding promptness of claims payments, a safety program, rehabilitation of injured workmen, and a dividend plan. It did not specify a general agent or solicitor, or say whether the plan was "open" or "closed." Three insurance companies submitted bids.[23]

The proposal from First Insurance Company of Hawaii offered a dividend plan "applicable to individual risks, with the amount of dividend being determined on the basis of that risk's

[20] Doc. 490-91. Jacobson estimated an overall 15% saving could be expected under the group plan.

[21] Doc. 270-71.

[22] Doc. 220-22, 196, 571. Oda gave a copy of the specifications to an additional insurance company. Doc. 2442-43.

[23] *See* Doc. 197-200, 204-11, 2013-15. The alleged reasons for the lack of response are the subject of the counterclaim in this suit, and the action in Civil 74-306. *See* note 6 *supra*.

premium size and experience."[24] White, who handled the bid selection for the Segal Company, testified that First Insurance "did not . . . even come close to what we had asked for. . . . We had asked for . . . a dividend group plan. They did not submit one. [F]or that reason it was rejected."[25]

The Segal Company recommended the INA proposal, which quoted a 31.9% minimum retention, over the Argonaut Insurance Companies [*sic*] proposal, which quoted a 40.78% retention.[26] The PECA Board of Directors adopted the recommendation on January 24, 1974. At this time the defendants contemplated that Oda would write policies and turn over his net commissions to pay expenses incurred in the adoption and administration of the plan.[27]

Oda was licensed as a solicitor through the Yamada Insurance Agency, a general agent. Therefore it was necessary that any individual policies for the group plan sold by Oda be written through Yamada, which entered into a non-exclusive agency agreement with INA for that purpose.

On January 31, Oda wrote to all 120 signatory contractors reminding them of the terms of the new Article 19 and solicit-

[24] Doc. 204.

[25] Deposition of William D. White, Mar. 15, 1975, at 39. The First Insurance proposal is ambiguous as to whether the minimum premium to be considered for dividend payment would be $5,000 or $25,000. *Compare* Doc. 206 *with* Doc. 207 *and* Doc. 209. Even the former figure, however, would be unreasonably high for an association in which approximately half of the contractors pay premiums under $5,000. *See* note 10 *supra*.

Plaintiffs interpret Oda's testimony, Deposition, Feb. 27, 1975, at 97, to mean that the bid was rejected because it required a free choice of insurance agent by the insured and therefore did not conform to the bid request. Aside from the fact that Oda had no knowledge why the proposal was rejected, White's testimony on the point explains the reason and he was in charge of the process. In addition, the bid proposal did not specify that there could be no free choice of insurance agent, *see* Doc. 221-22, although the proposal apparently *anticipated* that Oda would be writing most of the policies: "In arriving at a retention factor, it should be assumed that all policies will be combined for commission purposes . . . ." Doc. 222.

[26] Doc. 196; *see* Doc. 2009-15. The INA proposal indicated that the policies would be issued through its subsidiary PEIC.

[27] Doc. 573.

ing applications for INA policies.[28] Oda followed up on this initial letter numerous times. Five contractors expressed a desire to remain with their then-present carriers or agents.[29] Oda responded that the bargaining agreement required use of the designated *carrier*. Plaintiffs have presented no evidence, however, to indicate that Oda or any of the defendants ever suggested to the contractors that they had to *buy* their insurance *through Oda* or coerced them to do so—notwithstanding the affidavit of a plaintiff that a representative of the PECA told him, on or about June 1974, that the plaintiff "would not be allowed to *sell* or service workmen's compensation insurance business with any of the other signatory electrical contractors . . . regardless of whether such insurance was placed with [PEIC.]."[30] Article 19 itself is silent on the subject.

For its part, INA insisted many times, as early as February 1974, that the PECA plan "will be an 'open' group as all our safety groups are and that any licensed producer can participate in our group subject to our internal requirements."[31] INA communicated this to the Segal Company, to Oda, to the PEIC San Francisco office, to Yamada, and to the PECA's attorney.[32] Yamada's president directly advised Bayly, Martin & Fay of Hawaii (BM&F)—the plaintiff referred to in the previous paragraph—that any general agent representing PEIC could issue policies to electrical contractors.[33] In fact, PEIC appointed BM&F general agent on August 20, 1974, and that appointment is still in effect.[34]

In addition, agents other than Oda sold INA/PEIC insurance to Mid-Pac Electric in March 1974 and 1975, and to U.S.

[28]Doc. 281.

[29]Mauna Kea Electric, Doc. 131, Oda Deposition 114; National Concrete Sawing Co., Doc. 299, Oda Deposition 37-38, 130; Ides Electrical Service, Doc. 311; Reddy Electric, Doc. 114-15, 116; Yamatani Electric, Doc. 106, 439, Oda Deposition 138-39. There is no indication in the record which of these contractors, if any, were members of the PECA.

[30]Affidavit of Trenor Thompson (emphasis added).

[31]Doc. 2424-25.

[32]Doc. 2424-25, 166-67, 150-51, 121-22, 1117-18.

[33]Deposition of Thomas H. Takamune, Feb. 25, 1975, at 50-53.

[34]Affidavit of Clifford J. Miyoi.

Industries, Inc. (including as a division Wasa Electrical Service) in April 1975. The sales agent in the latter instance is parent of one of the plaintiffs herein.[35]

Oda was disturbed by the prospect of other agents writing insurance since Oda's net commissions went to pay the PECA for the expense of setting up and administering the group plan,[36] and eventually to help reduce premiums. Oda rejected a proposal from Atlas Insurance Agency in July 1974 that Atlas serve as coordinating broker for the plan.[37]

None of the plaintiffs sought to compete with Oda or Yamada for the business of the electrical contractors under the group plan.[38] Rather, they first sought a declaration from the Insurance Commissioner that the plan was illegal. When the Commissioner and Attorney General concluded that there did not appear to be a violation of the Hawaii Insurance Law,[39] plaintiffs instituted the present action.

[35]Affidavit of Michael Jones.

[36]Doc. 63-64, 192-93.

[37]Doc. 54-55. *See* text following note 11 *supra* regarding the role of a broker in group plans.

[38]The Court can only speculate on their reasons. Perhaps they believed that the group plan violated the antitrust or insurance laws, whether it was open or closed. Perhaps they did not want to become agents for INA/PEIC (although INA indicated that even that wasn't necessary; they could deal through Yamada, *see* Doc. 1117-18). Many plaintiffs certainly believed that the plan was closed, and that they were precluded from writing insurance. *See, e.g.*, Doc. 1128-32. The Court regrets the extent to which lack of communication among the parties may have led to this litigation, and hopes that this note will help others in the future to avoid the same mistake.

[39]Doc. 1052. Commissioner Edwin H. Honda wrote to the Board of Underwriters:

> "The plan, as we understand it, will operate in the following manner:
> "1. All Association members must participate in the insurance program.
> "2. Dividends, if any, will be paid directly to each insured. The PECA will not participate in the dividends.
> "3. Any electrical contractor, member or non-member, will be able to participate in the program.
> "4. Dividends, if any, will be paid on a flat amount basis to all participants."

THE ANTITRUST CLAIMS

Plaintiff's complaint charges that the IBEW, PECA, and INA entered into a conspiracy to require contractors to purchase their workmen's compensation insurance solely through INA/PEIC, and that they have excluded plaintiffs from writing or renewing insurance with members of the PECA, thus violating § 1 of the Sherman Act. The legal argument in their motion for summary judgment includes the additional allegation that defendants establish a monopoly in favor of INA, Yamada and Oda,[40] which would be a violation of § 2. The Court will treat each issue in turn.[41]

A. Alleged per se violations of § 1

Plaintiffs cite several cases which establish the proposition that in some circumstances collective refusals to deal, or boycotts, constitute *per se* violations of § 1.[42] *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). They characterize defendants' actions as a boycott, and therefore illegal *per se* without regard for the motivations of the defendants or the actual economic consequences of their activity. However, this Court finds that the dealings among the defendants do not fall within the class of automatically proscribed conduct.

[40]Plaintiffs' Opening Brief 24.

[41]The sale of workmen's compensation insurance in Hawaii by Oda or any of the plaintiffs at times relevant to this suit is an integral part of an interstate transaction because the insurer is a California corporation. The Supreme Court "has long held that 'there is an obvious distinction between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.' " *Goldfarb v. Virginia State Bar*, 43 U.S.L.W. 4723, 4727 (U.S. June 16, 1975), *quoting United States v. Frankfort Distilleries*, 324 U.S. 293, 297 (1945).

Since a taxi trip between stations to change trains as part of an interstate journey has been held to be in the stream of commerce for Sherman Act purposes, *see United States v. Yellow Cab Co.*, 332 U.S. 218, 228-29 (1947), it follows that intrastate competition for the sale of interstate insurance policies is within the reach of federal antitrust law.

[42]"It is often said that the concerted refusal to deal—or its evil-sounding equivalent, 'boycott'—is unlawful per se. But there may be restraints with some boycott characteristics that are not or should not be automatically unlawful. . . . Indeed, one might even hold that any agreement affecting competitive behavior is necessarily an agreement that the collaborators will not buy or sell on any other terms; and there is no sharp logical distinction between refusing to sell at all and refusing to sell except on condition." P. Areeda, *Antitrust Analysis* 287 (1967).

Boycott of insurance carriers

Plaintiffs quote at length a good summary of boycotts in *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973):

> The first group [of cases], exemplified by Eastern States Retail Lumber Dealers Assoc. v. United States, 234 U.S. 600 . . . (1914), have involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. . . .
>
> Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207 . . . (1959), illustrates a second category of group boycott cases, involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination. . . .
>
> Unlike these first two categories, the third group of cases has concerned combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors. . . .

The defendants are not a horizontal combination of traders, so *Eastern States* does not apply. Nor is there a vertical combination among INA at one level, and IBEW/PECA at the other, to exclude from the market one of their competitors, so *Klor's* is not applicable. Article 19 is not a vertical combination, and there is no evidence that INA conspired with IBEW/PECA to exclude other insurance companies. The defendants invited 10 carriers to participate in the bidding.

The third category of cases described in *McQuade* is merely a variant of groups one and two. It still requires a boycott

victim, and there is none under this theory of the case.[43]

Boycott of insurance agents

In their second theory, plaintiffs maintain that "Each contractor is contractually prohibited from doing business with the insurance agent of its choice regardless of preference," and that "the labor agreement completely eliminates the plaintiffs' opportunity to compete with . . . Oda."[44] Plaintiffs have neither facts nor law to support this allegation.

Article 19 contains no contractual obligation that its signatories deal with Oda. Neither Oda nor any of the other defendants ever urged this interpretation upon any of the contractors. INA continually reminded the other defendants that the group plan was an open plan: any solicitor or agent of INA/PEIC could sell and write policies. At least one plaintiff was aware of this and became a PEIC general agent.

Moreover, Oda was not the only solicitor to write policies under the group plan, both before and after initiation of this suit. Plaintiffs, for their own reasons, *did not attempt to compete* with Oda. This does not mean that they were foreclosed—to the extent of a *per se* illegal boycott—from dealing with the contractors, even if a representative of the PECA told a plaintiff he would not be "allowed" to sell insurance to any of the contractors.

Plaintiffs misunderstood the terms of the agreement among the defendants.[45] But their misunderstandings cannot be used to test the legality of the defendants' activity. Plaintiffs have neither alleged nor presented evidence of an explicit group refusal to deal with all solicitors and agents save Oda/Yamada.

Assuming for purposes of summary judgment that a trier of fact could reasonably infer that an *implicit* agreement existed to use Oda exclusively, there would still not be a *per se* violation of § 1. Examining again the *McQuade* catalogue of group boycotts in the previous section,[46] there is no *Eastern States* horizontal combination of traders.

Nor would such an agreement fall within the *Klor's* rule. In *Klor's*, a powerful buyer, Broadway-Hale, allegedly conspired with several sellers to deprive the plaintiff—a competitor of the powerful buyer—of the right to deal freely with the sellers. Broadway-Hale used its leverage with the sellers to injure one of its competitors. Under the assumed factual inference of the instant case, the contractors agreed to deal with Oda because his revenues would be paid back to the contractors' association. The inferred agreement exists not for Oda's benefit as a *competitor* of plaintiffs, but for defendants' benefit as buyers or beneficiaries of insurance.

Plaintiffs did not allege or present evidence that any of the defendants is forcing non-PECA members to cease dealing with all other agents and to deal with Oda/PECA in its role as a seller of insurance. These facts would present a closer analogy to the *Klor's* situation than the record of this case reveals. A majority of members of PECA, bargaining agent for all the contractors, did impose a requirement that all contractors buy insurance from the winning bidder. But the agreement did not require the contractors to give their business to Oda, and it only incidentally affected those plaintiffs who were not agents of the winning bidder, and chose not to become agents, or to write through Yamada. Therefore the arrangement does not even questionably rise to the level of a *per se* boycott. If one of the majority's motives behind the single-carrier requirement was to make it easier for Oda to garner business, its legality must be tested under the rule of reason.[47]

[43]Plaintiffs first theory would probably be equally applicable to the several hundred group plans described in note 9, but plaintiffs have not cited any holding that a similar plan violates the antitrust laws.

Plaintiffs lay great emphasis on the fact that Article 19 requires all contractors to participate in the group plan, but they have not demonstrated the legal significance of this with respect to *per se* violations. It neither increases nor diminishes the strength of plaintiffs' boycott argument because the targets of the requirement to place insurance with the winning bidder are not antitrust boycott victims. The contractors who may be required by their collective bargaining agreement to deal with INA/PEIC "against their wishes" are "victims," if at all, of majority rule and American labor policy.

[44]Plaintiffs' Opening Brief 20, 22.

[45]*See note 38 supra.*

[46]*See* text preceding note 43 *supra.*

[47]*See text preceding note 48 infra.*

Plaintiffs cite *United States v. Insurance Board*, 188 F. Supp. 949 (N.D. Ohio 1960), and *United States v. General Motors*, 384 U.S. 127 (1966). Neither case is relevant to their assertions that defendants are engaged in a *per se* illegal boycott. In the first case, which did not even apply a *per se* rule, *see* 188 F. Supp. at 955, an organization of independent insurance agents (representing only stock insurance companies) excluded from membership agents who dealt with mutual companies. In *General Motors*, the automobile manufacturer and three associations of dealers adopted a program to eliminate sales of cars by franchised Chevrolet dealers to discount houses. Both cases involved a group of competitors combining to injure other of their competitors. In the instant case we have a group of buyers allegedly agreeing to deal with the seller of insurance who made them the most attractive offer, an entirely different situation. Plaintiffs argue that this constitutes an illegal boycott, but can cite no case in which such activity has been held to be *per se* illegal. "We must always guard against 'the tyranny of tags and tickets.' Cardozo, Mr. Justice Holmes, 44 *Harv. L. Rev.* 682, 688 (1931)." *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 79 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

On the other hand, defendants point to the *Hawaiian Oke* case which dealt with analogous facts. There the Ninth Circuit held that an "agreement between two or more suppliers who have been selling to or through distributor A to transfer their business to distributor B, who is also a party to the agreement" did not constitute a *per se* violation of § 1. *Id.* at 75.

The Court observed that group boycotts "have been held to be illegal per se under section 1 because they are 'naked restraints of trade with no purpose except stifling *competition*.' " *Id.* at 76. But where "the activity [has] a primary purpose and direct effect of accomplishing a legitimate business objective, [and has merely] an incidental and indirect adverse effect upon the business of some competitors . . . its legality is tested under the 'rule of reason.' "[48]

[48] *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1003 & n.2 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), citing and explaining *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, *supra*.

The *Hawaiian Oke* court concluded that the plaintiff had failed to establish a *per se* antitrust violation because the exclusion of the plaintiff was "merely the incidental result of appellants' agreement to transfer their lines" to a new distributor and that the suppliers had no anticompetitive motive. *Id.* at 80.[49] The Ninth Circuit distinguished cases holding group boycotts to be *per se* violations because in all of those cases "there was a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *Id.* at 76. The Court noted there were no price fixing or other similar activities, and stressed that the evidence—as in the instant case—indicted only that the suppliers were dissatisfied with the plaintiff as a distributor. The defendants in *Hawaiian Oke* merely wished to obtain better distribution of their products; here, they merely wish to buy a better service and to save money.

B. Reasonableness of defendants' conduct

Plaintiffs have failed to establish by citation or analysis that defendants' activity is a concerted refusal to deal that is illegal *per se*. This Court must therefore examine the motives of the parties, the economic impact of the activity, and its effect upon competition.

The IBEW initiated its proposal for a change in the method of purchasing insurance in order to create opportunities for better claims service for its members, more effective safety plans, and better rehabilitation programs. The PECA eventually agreed to the group-plan approach because it saw several direct benefits for electrical contractors in addition to the direct benefits to its employees. Better safety and rehabilitation programs could reduce premiums. Group purchasing could lead to lower retentions by the carriers. Group evaluation of dividends could make all contractors eligible to receive divi-

[49] *Accord, Ark Dental Supply Co. v. Clavitron Corp.*, 461 F.2d 1093 (3rd Cir. 1972); *Cartrade, Inc. v. Ford Dealers Advertising Ass'n*, 446 F.2d 289, 295 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972); *Marder v. Conwed Corp.*, 378 F. Supp. 109 (E.D. Pa. 1974); *Western Wholesaler Liquor Co. v. Gibson Wine Co.*, 372 F. Supp. 802 (D.S.D. 1974).

dends regardless of the size of their individual premiums, increasing total dividends. Commissions earned by Oda and credited to the PECA could cover expenses incurred in administration of the plan, as well as eventually lead to reduced premiums through a negotiated lower commission.

The unique role of Oda and the mandatory nature of the PECA group plan has set it apart from many similar plans operating elsewhere. The mandatory feature is reasonable because it increases the likelihood of success in achieving the safety, rehabilitation, and cost-reduction goals. In fact, plaintiffs' documents show that most groups are not mandatory because it is to the *group's disadvantage* to be burdened with poor risks.[50] These primary, beneficial motives outweigh the fact that the arrangement makes it easier for Oda to dominate the sale of insurance to all contractors, taking business away from plaintiffs, especially since an overwhelming majority of the contractors expressed approval of the plan in the first place.

With regard to Oda's role, it is clear from plaintiffs' evidence that a single broker or solicitor must coordinate the group plan if it is to achieve all of the objectives previously cited.[51] In the § 1 context, it is not only reasonable but laudatory that the coordinating broker be someone both intimately familiar with the industry for whom the service is provided, and willing to use his profits to reduce consumer costs even further.

The motives of the defendants were salutary, and the economic impact beneficial, except arguably upon a handful of contractors, and upon plaintiffs with whom Oda was beginning to compete. This Court cannot conclude that the injury to plaintiffs' business, in light of all the benefits derived from defendants' activities, is proscribed by § 1 as unreasonable. The IBEW, PECA, the Martin Segal Company, Fujikawa, and Oda, developed an idea for a superior method of buying and selling insurance. Their approach was a variant of a plan that

[50]*See* text following note 11 *supra*.

[51]*Id.*

had been used extensively in other markets but which was new to Hawaii. Any one of the plaintiffs could have developed the same idea earlier and sold it to the IBEW/PECA. They may still do so in other industries. The record is clear that plaintiffs even now can compete with Oda and Yamada, although most contractors would understandably prefer to deal with Oda because of the additional benefits that may accrue to them.

Plaintiffs were not innovative, however, and thus they lost some of their business to new competitors who had a superior service to offer. The purpose of the antitrust laws, however, is to "protect competition, not competitors; and stiff competition is encouraged, not condemned."[52] By taking the initiative as they did, the defendants have brought an element of competition into an otherwise noncompetitive market, with the probably likelihood of more safety on the job, better rehabilitation for injured workers, savings to employers, and lower prices to consumers.

Nor is the reasonableness of defendants' conduct a question of ultimate fact for a jury to decide in this case. This court has assumed for the purpose of this decision that the majority of electrical contractors agreed with each other and with Oda to cease dealing with the plaintiffs and to deal only with Oda, and required an unwilling minority of contractors to buy from INA, increasing the likelihood they would buy through Oda. As in *Hawaiian Oke*, "[n]othing in the record suggests, much less would support an inference, that their purpose was to eliminate or damage plaintiff[s], to force [them] to comply with unlawful demands, rather than to get better [service]." 416F.2d at 78.

Even if plaintiffs presented evidence, as did Hawaiian Oke, "that the expressed reason for the change may not have been valid, and hence may not have existed, [and] some sinister, anticompetitive motive [could] be inferred" by the trier of fact, "[s]urely liability for treble damages should not be based on such second guessing of business judgment by a jury." *Id.*

[52]*Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80, 84 (3rd Cir. 1973) ("To be sure, Blue Cross' initiative makes life harder for commercial competitors").

However, plaintiffs here, after seeking and obtaining full discovery, after having been satisfied to move for summary judgment,[53] presented no evidence to contradict the reasonableness of defendants' action. As in *Hawaiian Oke*, there is insufficient evidence to sustain a verdict for plaintiffs,[54] so the § 1 claim in this case should proceed no further.

C. Alleged violations of § 2

Although not stated in their complaint, plaintiffs allege in their brief without elaboration that "a monopoly has been established in favor of INA and Yamada Insurance Agency, Ltd. and the solicitor, Mr. Oda. Out of a potential of 128 customers, Mr. Oda has 'solicited' and has placed 114 workmen's compensation insurance policies (Oda Answers to Interrogatories 32)."[55]

It is possible that in the course of an appropriate § 2 claim different antitrust consequences would flow from Article 19's mandate that all contractors buy from the designated carrier, or from the rebate arrangement between Oda and the PECA. *See United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 340, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Even though Oda has captured almost all of the contractors' workmen's compensation insurance business, however, plaintiffs have presented no evidence to indicate that "sale of workmen's compensation insurance to electrical contractors in Hawaii" is the relevant market for judging a § 2 claim. On the basis of the record before it, this Court believes that it is not the relevant market and therefore no illegal monopoly has been established in favor of Oda.

[53]Making inapplicable the strictures of *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.").

[54]416 F.2d at 80. The court concluded that "No unreasonable restraint was proved." *Id.* at 74; *accord, Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Cartrade, Inc. v. Ford Dealers Advertising Ass'n*, 446 F.2d 289, 295 (9th Cir. 1971).

[55]Plaintiffs' Opening Brief 24.

D. Exemptions from antitrust liability[56]

The labor exemption.

The IBEW and PECA have sought antitrust immunity under a nonstatutory exemption that embraces certain labor activity. The area of law is a complicated one since it arises from the conflict between two cornerstones of 20th century economic policy, the federal antitrust and labor statutes. Fortunately, Judge Sneed has provided an illuminating history of the difficult area, and has synthesized from its key cases rules for the courts of this circuit to follow in deciding the issue. *See Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541 (9th Cir. 1974).

The Supreme Court faced the issue of whether certain union combinations with non-labor groups were exempt from antitrust liability in *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945):

> Our problem in this case is therefore a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet businessmen to do the precise things which the Act prohibits.

Id. at 801. "Answering the question affirmatively," wrote Judge Sneed, "the Court was careful to distinquish [*sic*] such aiding and abetting from unilateral union activity which may achieve an end identical to that which results from labor and business acting in concert." 494 F.2d at 550-51. Judge Sneed concluded:

> The type of activity by non-union entities sufficient to draw unions with whom they deal within the sphere of *Allen Bradley* was and remains uncertain. Union-imposed restraints which serve purposes closely related to wage,

[56]Of course the question of defendants' immunity under any exemption is an entirely different issue than whether or not their activity constitutes a restraint of trade that is illegal under the Sherman Act, and logically precedes that latter issue. *See Connell Constr. Co. v. Plumbers Local 100*, 43 U.S.L.W. 4657, 4663-64 (U.S. June 3, 1975). The Court has dealt with the merits of the antitrust issues first because it felt that the discussion of the exemptions would be more understandable when related to a full explanation and discussion of plaintiffs' claims.

hours, and conditions of employment generally are considered free of *Allen Bradley* taint. On the other hand, union cooperation which enables one or more employers to obtain control of the supply and price of a certain product in a particular market, or to make possible the elimination of troublesome competition, is unmistakably tainted.

Id. at 551 (footnotes omitted). This distinction continues to be valid, the Ninth Circuit ruled, despite two post-*Allen Bradley* opinions which the Supreme Court issued without a majority decision.[57]

Defendants argue the applicability of the labor exemption as if the union were "acting solely in its own self-interest, [and simply] forced reluctant employers to yield to certain of its demands."[58] If that were the situation, we would be dealing with a union-imposed restraint related to a condition of employment, probably free of *Allen Bradley* taint.

From the very beginning of its discussions with management, however, the IBEW was also interested in helping the PECA derive revenues from the project. Both the union and the association considered the mandatory nature of the group plan to be important for that reason—as well as for making the plan *qua* plan more effective. In other words, the IBEW cooperated with Oda/PECA's efforts to obtain control of the sale of workmen's compensation insurance to all electrical contractors in Hawaii. As in *Bodine Produce*, there was in this case an "alliance between [labor] and non-labor business groups . . . to divide markets, or to reduce competition." 494 F.2d at 561.

[57]*See* 494 F.2d at 551-54, analyzing *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

Both sides in the instant case deal with *Connell Constr. Co. v. Plumbers Local 100*, 43 U.S.L.W. 4657 (U.S. June 3, 1975). Defendants correctly distinguish the case, since it analyzed facts and economic circumstances vastly different from those before this Court. Plaintiffs read the case as sounding the death-knell of the nonstatutory labor exemption. This Court declines to go so far in its interpretation of *Connell*, nor is it necessary to do so.

[58]*Intercontinental Container Transp. Corp. v. New York Shipping Ass'n*, 426 F.2d 884, 888 (2d Cir. 1970).

Therefore, the activity is not free from *Allen Bradley* taint and not entitled to immunity by reason of the IBEW's union status.

The insurance industry exemption

The McCarran-Ferguson Act provides a partial exemption of insurance activities from the Sherman Act. It provides that federal antitrust laws "shall be applicable to the business of insurance to the extent that such business is not regulated by State law," 15 U.S.C.A. § 1012(b) (1963), except that "[n]othing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *Id.* § 1013(b).

The Insurance Commissioner and Attorney General specifically condoned certain aspects of the PECA/IBEW group plan operation: its mandatory nature, the eligibility of all contractors to participate, and its dividend plan.[59] Since the Insurance Commissioner has authority to determine whether a violation of the insurance laws has occurred and to make rules effectuating the laws,[60] the defendants' business was "regulated by State law," to the extent of the Commissioner's approval, within the meaning of the McCarran-Ferguson Act.

All of the activities of defendants INA and PEIC material to this action were thereby exempted from liability under the Sherman Act by 15 U.S.C.A. § 1012(b). Furthermore, the evidence does not indicate any agreement by INA/PEIC to exclude either carriers or agents from the market, which if present might make applicable the boycott provision of § 1013(b).

Defendant Oda also seeks shelter under the McCarran-Ferguson umbrella. This Court has found that there was no "boycott of insurance carriers," making the protection unnecessary for that aspect of the case. If there were a boycott, the protection of § 1012(b) would be lifted by § 1013(b). Under these facts, the applicability of the McCarran-Ferguson Act is reduced to a tautology.

[59]*See* note 39 *supra*.

[60]Haw. Rev. Stat. § 431-35.

The Commissioner's approval, however, did not contemplate Oda's participation as a solicitor, with all the antitrust ramifications that plaintiffs have urged upon this Court, albeit unsuccessfully. Moreover, even if there were regulation by state law of this aspect of the case, the possible factual inference of an implicit agreement to use Oda exclusively[61] brings into play the boycott provision of § 1013(b), removing the immunity of § 1012(b). Therefore it has been necessary for this Court to reach the merits of the antitrust issues, *supra*, holding that the "boycott" was neither *per se* illegal, nor unreasonable.

THE LABOR ACT CLAIM

Plaintiffs allege that Article 19,[62] by requiring signatory contractors to purchase insurance from the designated carrier, is an unfair labor practice, unenforceable and void under § 8(e) of the National Labor Relations Act.[63] By its terms § 8(e) forbids collective bargaining contracts whereby an employer agrees to cease to deal in products of another employer, or agrees "to cease doing business with any other person."[64]

[61] *See* text accompanying note 46 *supra*.

[62] *See* text accompanying note 21 *supra*.

[63] 29 U.S.C.A. § 158(e) (1973). Plaintiffs allege in their amended complaint that the union "threatened, coerced, and restrained members of PECA" to enter into Article 19 and "to cease doing business with Plaintiffs and to cancel insurance policies with carriers, general agents, and solicitors other than those agreed upon by IBEW Local 1186." This activity, it is alleged, constitutes violation of § 8(b) (4)(ii) of the NLRA, 29 U.S.C.A. § 158(b) (4)(ii) (1973), but the plaintiffs ignored the cause of action in their motion for summary judgment and at oral argument. They did not present evidence of threats or coercion directed by the IBEW at PECA members or at other electrical contractors.

[64] Section 8(e) provides: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . ." 29 U.S.C.A. § 158(e) (1973) (Provisos omitted).

Although § 8(e), "like other sections designed to curb secondary activity, does not shimmer with clarity,"[65] plaintiffs' and the Court's own research have failed to disclose any cases that hold that § 8(e) proscribes a contract similar to the one before this Court. Likewise, there is no authority from which principles may be drawn along the lines of plaintiffs' urging.

Before turning to judicial interpretation of § 8(e) relevant to the argument of the parties, there is a preliminary problem. It is possible the contract does not fit the letter of the statute. Section 8(e) might be read to prohibit agreements aimed at particular persons or a definable group of persons.[66] The classification drawn by Article 19 does not appear to be aimed at particular persons or a definable group of persons, because the parties to the agreement did not contemplate who the outsiders would be, either by name or by characteristics. The contractors would merely "cease doing business" with all those who did not submit the lowest bid. However, since the defendants did not rely on that point, this Court will assume, without deciding, that "the words of § 8(e) unambiguously embrace"[67] Article 19, and examine the judicial gloss placed on the statute by some of the many courts faced with its enforcement.

The seminal Supreme Court case, *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), held that § 8(e) does not reach employees' primary activity but only reaches those agreements with "secondary" objectives. The Court and commentators agree that the core purpose of §§ 8(b) (4) (ii) and 8(e) is to outlaw union pressure directed at a *neutral employer* to induce it to cease doing business with an employer with whom the union is engaged in a *labor dispute*, *i.e.*, the classic "secondary labor boycott." *Id. passim*.[68] "Con-

[65] *NLRB v. National Maritime Union*, 486 F.2d 907, 911 (2d Cir. 1973).

[66] *National Woodwork Mfr. Ass'n v. NLRB*, 386 U.S. 612, 619 & n.4 (1967).

[67] *Id.* at 619.

[68] As the Court noted, most of the legislative history came from passage of § 8(b) (4) (A) and its successor § 8(b) (4) (B). Section 8(e) was designed primarily to close various loopholes in the application of § 8(b) (4) (A), and its enactment "did not expand the type of conduct which § 8(b) (4) (A) condemned." *Id.* at 633-34.

gress . . . meant to protect the employer only from union pressures designed to involve him in disputes not his own." *Id.* at 625-26. "[H]owever severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective." *Id.* at 627.

National Woodwork involved a work-preservation agreement: a carpenters' union and an association of general contractors agreed that union members would not handle doors that were premachined in such a way as to eliminate some of the work traditionally done by union members at the job site. After discerning the Congressional intent to reach only "primary" activity, the Court recalled that a previous decision[69] sanctioned work-preservation clauses like the one involved in *National Woodwork*. The Court observed that it would "be incongruous to interpret § 8(e) to invalidate clauses over which the parties may be mandated to bargain." *Id.* at 642-43. The result would not only be incongruous; it would be inconsistent with Congressional intent to leave primary activity outside the scope of § 8(e).

Article 19 in the instant case passes the "primary" test and fails the "secondary" test. The principal primary activity of the entire labor law regime probably is bargaining over terms and conditions of employment. While there may be a split of authority as to whether the actual naming of the insurance carrier is a mandatory subject for bargaining, there is unanimity on the proposition that benefits, coverage, and administration of a health insurance plan are mandatory bargaining items.[70] Article 19 establishes a *method* for selection of a carrier which is intended to increase the quality of the benefits enjoyed by union members. The IBEW never insisted on a carrier by name nor is it interested in which carrier wins the competitive bidding. Therefore Article 19 resulted from primary bargaining activity, and is just as much within the rationale of *National Woodwork* as was the work-preservation agreement of that case.

[69] *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

[70] *Compare Bastian-Blessing v. NLRB*, 474 F.2d 49, 52 (6th Cir. 1973), *enforcing* 195 N.L.R.B. 1108 (1972) *and* 194 N.L.R.B. 609 (1971), *with Connecticut Light & Power Co. v. NLRB*, 476 F.2d 1079 (2d Cir. 1973) *enforcing* 196 N.L.R.B. 967 (1972); *see Medical Manors, Inc.*, 201 N.L.R.B. 188 (1973).

Moreover, there is no secondary labor objective in the enactment of Article 19, unlike the cases cited *infra* or *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945), in which the employer-union agreement was used as a "sword" to monopolize *other jobs* for union members. The IBEW has no interest whatsoever in labor relations of any employer in the insurance industry. It certainly is not involved in a labor dispute with any of them.

Plaintiffs seek comfort in *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975), *enforcing on this point* 204 N.L.R.B. 742 (1973); *NLRB v. National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), *enforcing* 196 N.L.R.B. 1100 (1972); and IBEW Local 1186, 192 N.L.R.B. 254 (1971), *enforced sub nom. NLRB v. Pacific Electrical Contractor's Association*, 478 F.2d 853 (9th Cir. 1973).

In *ACCO Construction*, the agreement restricted the freedom of building contractors to utilize non-union repairmen (employees of the sellers of heavy equipment) for post-warranty service of equipment they had purchased. The union began to enforce the clause *coincident with a drive to organize the equipment dealers*, at which point the dealers brought charges. On appeal, the union's only contention was that the transaction came within the construction industry proviso of § 8(e). The material factor of illegality in *Acco Construction* was use of the agreement during the drive to organize the equipment dealers.[71].

National Maritime dealt with a contractual requirement that the employer's sale of any of its ships to another employer would be conditioned upon the purchaser agreeing to abide by the original employer's collective bargaining agreement with the union—whether or not the purchaser's employees were

[71] This issue was not discussed in the Ninth Circuit's opinion, of course, since the applicability of the body of § 8(e) was never challenged—merely whether the agreement was exempt under the construction industry proviso. *See* 204 N.L.R.B. 742, at 745. Plaintiffs argue that, as in *ACCO Construction*, the construction proviso is inapplicable to defendants here. That point is immaterial.

already represented by a rival union. The Second Circuit thus faced a contract that was a purported "work preservation" agreement, perhaps legal under *National Woodwork*, and an agreement that simultaneously appeared to be aimed at the labor relations of a secondary employer. 486 F.2d at 912.

The Board and the Second Circuit explicitly relied on the Supreme Court's primary/secondary analysis in *National Woodwork*, and determined that there was no *legitimate* work preservation objective. The Board determined the union's objective to be the illegal desire to force a purchaser into a union contract. Its opinion concluded:

> In these circumstances, these clauses place restrictions on sales which are not strictly "germane to the economic integrity of the principal work unit. . . ." Instead they only insure that the purchasing employer is under contract with the NMU.[72]

The Second Circuit in enforcing the Board's decision also looked beyond the union's claim that the clause was "aimed at the labor relations of the primary employer." *See* 486 F.2d at 912. As did the Board, the Court found that the real purpose of the clause illegally affected a secondary employer.

Plaintiffs' third case, *IBEW Local 1186*, involved an agreement that the employees would be assigned to work only on equipment and material owned by their employers, the electrical contractors. An issue was whether the contract required the contractors "to cease doing business with any other person," *e.g.*, those building owners who wished to retain ownership of electrical equipment being installed for them by the contractors' employees.

The Trial Examiner appeared to have applied a literal reading of § 8(e), insofar as he found "no direct evidence that the Union herein is seeking to affect or control the labor relations of any manufacturer of electrical equipment. Although such is usually an objective and consequence of contracts that violate Section 8(e) of the Act, that section outlaws *any* agreement to cease doing business with another employer. . . ." 192 N.L.R.B. 254, at 258.

[72] 196 N.L.R.B. at 1101 (footnote omitted).

The union business manager had testified that there were a few large jobs where the installation work was not done by union members. The challenged contract reached those situations, but also affected those people who wished to own the equipment and material *and* still hire unionized contractors. Unlike *National Woodwork*, where every "cessation of business" resulted in a corresponding preservation of work for the union members, the challenged agreement in *IBEW Local 1186* was overkill, and thus had *secondary effects:*

> The Union's dispute or grievance on work assignment herein is actually with those who assign installation work to employees who are not electricians and members of the Union. To prevent them from being in a position to do this, the Union is seeking to require *all* general contractors and building owners to cease buying their fixtures from any source other than electrical contractors. Thus, included therein are *employers neutral and secondary to the Union's dispute* with those who would assign installation work to others.

Id. (emphasis added). The Supreme Court in *National Woodwork* eschewed a literal reading of § 8(e). The Trial Examiner's analysis in *IBEW Local 1186* does not depart from the Court's approach.

Plaintiffs urge this Court to test the *relative* merit of the primary interest in this case (bargaining over terms and conditions of workmen's compensation coverage) against the merits of those primary interests in the various cases above that have found § 8(e) violations. Since defendant union's interest here is less than the others', plaintiffs argue, it follows *a fortiori* that there is also a § 8(e) violation herein.

Not only is this Court not inclined to make a finding against the relative merits of the defendants' interests; the argument misses the point of *National Woodwork* and its progeny:[73] to

[73] In addition to the cases already cited, *see NLRB v. Muskegan Bricklayers Local 5*, 378 F.2d 859 (6th Cir. 1967); *Meat & Highway Drivers Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964); *Orange Belt District Council 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Bakery Wagon Drivers Local 484 v. NLRB*, 321 F.2d 353 (D.C. Cir. 1963); *District 9, IAM v. NLRB*, 315 F.2d 33, 36 (D.C. Cir. 1962); *NLRB v. Teamsters Local 107*, 300 F.2d 317 (3d

constitute a § 8(e) violation, an agreement must have (at least) secondary labor objectives, in the fulfillment of which it affects neutral and secondary parties. The instant case does not have these elements. Since plaintiffs have not made out a *prima facie* case, they have no legal position from which to argue equities.

CONCLUSIONS

Plaintiffs' Motion for Summary Judgment is DENIED; defendants' Motion for Summary Judgment is GRANTED. Defendants will prepare the Order.

DATED: Honolulu, Hawaii, November 25, 1975.

Cir. 1962); *NLRB v. Teamsters Local 182*, 272 F.2d 85 (2d Cir. 1959).

Some of these cases dealt with §§ 8(b) (4) (A) or (B), but § 8(e) was intended to reach the same conduct. *See* note 68 *supra*. "Judicial decisions interpreting the broad language of § 8(b) (4) (A) of the Act uniformly limited its application to such 'secondary' situations." *National Woodwork Mfr. Ass'n v. NLRB*, 386 U.S. 612,626 (1967). *See* cases and commentary cited *id.* at 626 n.16.

APPENDIX C

Denial of Petition For Rehearing

(Entered July 31, 1978)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACKERMAN-CHILLINGWORTH, etc., et al., *Appellants*,	)	No. 76-1264
v.	)	ORDER
PACIFIC ELECTRICAL CONTRACTORS ASSOCIATION, etc., et al., *Appellees.*	)	

Before: ELY, HUFSTEDLER, and WRIGHT, Circuit Judges.

The judges constituting the panel originally concerned with the subject case (Ely-Hufstedler-Wright) have unanimously voted to deny the Petition for Rehearing. The three judges have voted unanimously to reject the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX D

Statutes and Rules

SHERMAN ACT
(15 U.S.C. § 1)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

FEDERAL RULES OF CIVIL PROCEDURE
RULE 56
SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered

forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to

justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.